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THE TREATY-MAKING POWER OF THE UNITED STATES

BY

ABRAHAM C. WEINFELD

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THE TREATY-MAKING POWER OF THE UNITED STATES

This preliminary draft of THE TREATY-MAKING POWER OF THE UNITED STATES by Abraham C. Weinfeld is made available for confidential use within the Division of Review because of its usefulness in connection with other studies.

It is a preliminary draft -- an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a fully rounded treatment of the subject.

L. C. Marshall
Director, Division of Review

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SUMMARY

INTRODUCTION. The United States Government must face the problem of regulating labor conditions by international treaties because as a member of the International Labor Organization the United States is under a duty to submit draft conventions and recommendations adopted by International Labor Conferences to the competent authorities in this country for action.

CHAPTER I

ARE LABOR CONDITIONS A PROPER SUBJECT OF INTERNATIONAL NEGOTIATIONS AND TREATIES? In the last thirty years numerous treaties have been entered into between and among nations for the purpose of regulating labor conditions. Conspicuous among them are the conventions adopted by International Labor Conferences after the World War of which about 35 have been ratified by numerous nations. This treatment by the nations of the world has made labor conditions a proper subject for international negotiations and treaties.

CHAPTER II

HAVE THE STATES POWER WITH CONSENT OF CONGRESS TO ENTER INTO AGREEMENTS OR COMPACTS WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS? Though the United States Constitution permits States, with consent of Congress, to enter into agreements or compacts with foreign nations, that power does not extend to agreements or compacts regulating labor conditions. The agreements or compacts contemplated by the Constitution involve settlement of boundary lines and matters connected therewith which are intended to create a permanent state of things and are fulfilled by a single act like an act of cession. Labor conditions are not within the scope of those agreements or compacts.

CHAPTER III

HAS THE FEDERAL GOVERNMENT POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESSES, THE REGULATION OF WHICH HAS BEEN RESERVED TO THE STATES? The treaty-making power of the federal government does extend to matters reserved to the states by the federal constitution. This is the effect of an unbroken line of decisions of the Supreme Court of the United States. The federal government therefore has the power to enter into treaties regulating labor conditions even though the regulation of such conditions may have been reserved to the States by the Constitution.

CHAPTER IV

HAS THE FEDERAL GOVERNMENT POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESSES, THE REGULATION OF WHICH HAS BEEN DELEGATED TO CONGRESS? The federal government has such power. A treaty which is self-executing, that is, a treaty which shows an intention that it be enforced without further legislation, stands on an equal footing with an act of Congress. Such a treaty may repeal an act of Congress dealing with the same subject-matter and an act of Congress may repeal a treaty; whichever is later in time prevails.

CHAPTER V

IS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT A LIMITATION ON THE POWER OF THE FEDERAL GOVERNMENT TO ENTER INTO TREATIES? Proceedings in the

State conventions called to ratify the federal Constitution show that the people when ratifying the federal Constitution did so with the understanding that the Constitution would not encroach on their personal liberties. The due process clause is supposed to protect those liberties. Expressions by the Supreme Court of the United States in cases not involving treaties indicate that the Supreme Court will probably apply the due process test to treaties. Therefore no treaty should be entered into at this time involving fixing of minimum wages because that has been held unconstitutional in the case of Adkins v. Children's Hospital, 261 U.S. 525 (1923). On the other hand, prohibition of child labor may be included in a treaty because the Supreme Court has never held such prohibition to violate due process of law; the court did hold that prohibition of child labor in hazardous occupations does not violate due process. Similarly a treaty may be entered into regulating maximum hours of labor because the Supreme Court has never held such regulation to violate due process; the Supreme Court did hold a statute fixing maximum hours in any mill, factory or manufacturing establishment not to violate due process.

CHAPTER VI

DOES A TREATY THAT REGULATES LABOR CONDITIONS REQUIRE LEGISLATION TO BECOME EFFECTIVE? A treaty to regulate labor conditions must necessarily leave a vast field of regulation of details to the legislatures of the contracting parties. Normally, therefore, a treaty of that nature cannot be self-executing. For that reason no treaty regulating labor conditions should be expected to become effective until it is made effective by legislation. All conventions of the International Labor Organization call for legislation by the states who are signatories to the convention by way of giving effect to the conventions.

CHAPTER VII

RATIFICATION BY THE UNITED STATES OF CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOR CONFERENCE. Though under Article 405 of the Constitution of the International Labor Organization, a Federal state the power of which to enter into labor conventions is subject to limitations may treat a draft convention as a recommendation only, the United States is not in position to avail itself of that privilege; the power of the United States government to enter into labor conventions is not subject to limitations contemplated by the framers of Article 405. If the government had the right to treat a draft convention as a recommendation only, it would be under obligation to do no more than to forward a copy of the draft convention to the Congress and to the 48 legislators, they to enact such legislation in conformity with the recommendation as they might choose to.

Since the United States must treat a draft convention as a draft convention, it is under obligation to submit to the Senate and to the House of Representatives the conventions adopted at the June 1935 conference. If those conventions or any of them obtain the approval of two-thirds of the Senate and the consent of the majority of the House of Representatives, the President may ratify them. Thereafter it will be up to Congress to enact legislation to give effect to the convention.

The United States is under no duty to act on the conventions adopted by the International Labor Organization prior to June 1935, but it may ratify them, the procedure being the same as outlined with reference to the conven-

tions adopted in June 1935. Each convention should first be passed upon by experts in the field covered by the convention, and if it is found adapted to American conditions, the convention may be submitted to the Senate and to the House.

In favor of ratification of the conventions of the International Labor Organization, it may be said that a statute passed pursuant to a convention would be binding throughout the country and would, therefore, not result in undue advantages or disadvantages to various states. Such a statute would express the popular will since it would have the backing of the House and of the Senate. Bad working conditions in other countries tend to lower the conditions here, while raising conditions in other countries tends to support or even to raise conditions in this country. The International Labor Organization is not necessarily tied to the League of Nations. It has several members who are not members of the League and could function even if the League should cease to exist.

Against ratification it may be said that the country dislikes foreign entanglements, and also that if another party to a convention should complain that the United States has failed to live up to its obligations under a convention, such complaint might ultimately come before the Permanent Court of International Justice. It is to be borne in mind, however, that membership in the International Labor Organization contemplates the possibility of ratification by the United States of at least some of the International Labor Organization conventions. Ratification necessarily carries with it the possibility of a complaint being made by another member, and ultimately coming before the Permanent Court, and the further possibility that the Court might indicate "measures of an economic character" which other members "would be justified in adopting against a defaulting government." So far none of the 59 members of the International Labor Organization has ever made a complaint against another member. Cooperation with others always necessarily involves a certain measure of restraint.

CHAPTER VIII

CANADIAN CONSTITUTIONAL PROBLEMS IN CONNECTION WITH RATIFICATION OF CONVENTIONS OF THE INTERNATIONAL LABOR ORGANIZATION. COMPARISON WITH PROBLEMS IN THE UNITED STATES. The procedure by which treaties are made on behalf of Canada is so different from the procedure pursued in the United States, that there is no basis for comparison. As to distribution of legislative powers, in Canada the Provinces enjoy legislative powers which are exclusively enumerated as belonging to the Provinces, while all other powers rest with the Dominion government. Though the method of distribution of legislative power is the very opposite of the method in the United States, labor conditions are normally within the jurisdiction of the Provinces, just as they are normally within the jurisdiction of the States in the United States.

There is no due process limitation in Canada.

Several conventions drafted by the International Labor Organization and relating to labor conditions of seamen have been ratified on behalf of Canada, and have been followed by legislation passed by the Dominion parliament. That body has jurisdiction over labor conditions of seamen, irrespective of international engagements.

As to those conventions of the International Labor Organization which regulate labor conditions in fields normally within the jurisdiction of the Provinces, the procedure was, until recently, to refer the conventions to the Provinces and to the Dominion Parliament for such action as they might choose to take thereon within the scope of their normal legislative powers. In 1931 and 1932 decisions of the highest constitutional court in the British Empire emphasized the power of the Canadian Parliament to enact legislation by way of giving effect to international conventions. In line with those decisions, in 1935 the Canadian government caused to be ratified several conventions which regulate labor conditions normally within Provincial jurisdiction, and the Parliament of Canada enacted legislation to give effect to those conventions in June and July 1935.

CHAPTER IX

SUGGESTIONS AS TO TREATIES WITH CANADA ABOLISHING CHILD LABOR AND LIMITING HOURS OF LABOR. Since the standards fixed in the International Labor Organization conventions are generally too low for an industrially advanced country like the United States, the treaty power might be used to establish higher standards by a separate treaty with one or more powers as, for instance, by a treaty with Canada. Specifically, attention should be directed to the economic and political possibilities of a treaty with Canada limiting the age of admission of children to employment to 15, or perhaps 16 years, and limiting the hours of labor to 8 in the day and 40 in the week.

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THE TREATY-MAKING POWER OF THE UNITED STATES

On August 20, 1934, the United States became a member of the International Labor Organization.(1) The General Conference of that organization which met in Geneva in June 1935 adopted a series of draft conventions, including a convention concerning the employment of women on underground work in mines, a convention limiting hours of work in coal mines, in glass bottle works, and others.(2) Within a year or at the latest within eighteen months from June, 1935, it will be necessary for the United States to bring the conventions as well as the recommendations adopted at that conference "before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action."(3) It is necessary, therefore, not only for the purposes of the National Recovery Administration but also for the purposes of the government in general to consider the entire subject in order to determine first, what governmental powers there are in this country competent to deal with labor conditions internationally and, second, what procedure should be followed. For the sake of brevity the phrase "labor conditions" will be used instead of "maximum hours, minimum wages, child labor, and other conditions of employment". The problem seems logically to embrace the following questions: 1. Are labor conditions a proper subject of international negotiations and treaties? 2. Have the States power with consent of Congress to enter into agreements or compacts with foreign nations regulating labor conditions? 3. Has the federal government power to enter into treaties with foreign nations regulating labor conditions in businesses the regulation of which has been reserved to the States? 4. Has the federal government power to enter into treaties with foreign nations regulating labor conditions in businesses the regulation of which has been delegated to Congress? 5. If there is power under any of the above categories, are there limitations on that power, and what are they? 6. Would treaties be binding when ratified and agreements or compacts when made with consent of Congress, or would they be binding only when followed by legislation giving effect to the treaty or to the agreement or compact? 7. Can anything be learned from the proceedings of other federal States which ratified conventions drafted by the International Labor Organization, such as Canada, Germany before Hitler, Switzerland and others? 8. What are the specific problems, apart from those already raised, that may come up in connection with possible ratification of the International Labor Organization conventions or in connection with concluding other treaties dealing with labor conditions?

The applicable provisions of the Constitution of the United States are as follows:

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(1) Proclamation by President Franklin D. Roosevelt dated Sept. 10, 1934, Treaty Series, No. 874, p. 1.
(2) International Labor Office, Official Bulletin, August 15, 1935, vol. XX, No. 3.
(3) Constitution of the International Labor Organization, Art. 405, Treaty Series, No. 874, p. 13.

Article I, Section 10.

"No State shall enter into any Treaty, Alliance, or Confederation; ... No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power, ..."

Article II, Section 2.

"He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; ..."

Article III, Section 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ..."

Article VI.

"...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding..."

CHAPTER I.

ARE LABOR CONDITIONS A PROPER SUBJECT OF INTERNATIONAL NEGOTIATION AND TREATIES?

The Supreme Court of the United States has said that treaties are "designed to include all those subjects which in the ordinary intercourse of nations have usually been made subjects of negotiation and treaty." (4) "That the treaty making power of the United States extends to all proper subjects of negotiations between our government and the governments of other nations is clear." (5) "The treaty making power vested in our government extends to all proper subjects of negotiation with foreign governments." (6) "The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids', it does extend to all proper subjects of negotiation between our government and other nations. Geofroy v. Riggs, 133 U.S. 258, 266, 267; Re Ross, 140 U.S. 453, 465; Missouri v. Holland, 252 U.S. 416." (7) "The treaty-making power should be considered as broad enough to cover all subjects that properly pertain to our foreign relations...while through treaties it would be impossible to change the structure of our government, the treaty making power extends to all questions that are appropriately dealt with in dealings between nations and in the peaceful adjustment of international controversies. Former President Taft has expressed the view that the treaty-making power is dealing with our foreign relations and when we deal with our foreign relations, we are a nation undivided and presenting a united front. Everything, therefore, that is natural or customarily involved in such foreign relations, a treaty may cover, whether beyond the law-making power of Congress and within the control of state legislatures or not (Taft, Our Chief Magistrate and His Powers, p. 110)" (8)

Have labor conditions become matters which "in the ordinary intercourse of nations" are "usually made subjects of negotiation and treaty"? Are they "proper" subjects for negotiation and treaty between our government and foreign governments? It was not the intention of the framers of the Constitution in 1787 to limit the subject matters of treaties to those only that were then subjects of treaties. There is no evidence of any such intention and since the Constitution was built for an indefinite future it is reasonable to assume that its framers contemplated the possibility of changes in the subject matter of treaties and did not intend to freeze the foreign relations of the United States. The practice of the government is illuminating. In the course of its history the United States has entered into treaties covering numerous subject-matters which had not been regulated by

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(4) Holmes V. Jennison, 14 Pet. 540, 10 L. Ed. 579. (1840)
(5) Geofroy v. Riggs, 131 U.S. 258, 33 L. Ed. 642 (1889)
(6) Ross v. McIntyre, 140 U.S. 453, 35 L. Ed. 581 (1891)
(7) Asakura v. City of Seattle, 265 U.S. 332, 68 L. Ed. 332 (1923)
(8) Charles E. Hughes: The Supreme Court of the United States, pp. 111, 114, (1928).

international treaties prior to 1787. Some of the subject-matters are: Unification of the pharmacopoeial formulas for potent drugs (1906) (9); suppression of the abuse of opium and other drugs (1915, 1933) (10); protection of industrial property (1887, 1892, 1902) (11); suppression of plague and cholera (1907) (12); repression of the trade in white women (1908) (13); protection of inventions, patents, trade-marks, designs and industrial methods (numerous agreements going back to about 1860); literary and artistic copyright (numerous agreements going back to the 1890's); repression of the circulation of obscene publications (1911) (14); regulation of technical details and partial regulation of rates for services in the field of International Wireless Telegraph (1912) (15); commercial aviation (1931) (16); limitation of naval armament (1922) (17); setting up of international bureaus for gathering and dissemination of technical information, like the International Bureau of Weights and Measures (1878) (18); the Institute of Agriculture (1908) (19); the International Office of Public Health (1908) (20).

As to additional "new" subject matter, not only were treaties entered into to regulate such matters but the treaties were enforced by the courts, for instance, a treaty regulating the killing of migratory birds (21) or a treaty extending the time for filing applications for patents (22).

The conclusion is that, though a matter may not have been thought of by the framers of the Constitution as a subject-matter of international treaties, such matter is a "proper" subject for treaties in our time provided it is actually dealt with in treaties entered into by nations in their ordinary intercourse.

To what extent have labor conditions become subjects of actual negotiations and treaties? Early efforts to make them such are described in a report submitted by the French General Confederation of Labor (Confederation Generale du Travail) to the Conference of Allied Trade Unions held at Leeds, England, in 1916 (23). Negotiations by governments were carried on on numerous

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(9) William M. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, p.2209.
(10) Malloy, op. cit., p. 3025; U.S.Stat. At L. vol. 48, part II, p. 1543.
(11) Malloy, op. cit., pp. 1935, 1943 et seq.
(12) Malloy, op. cit., p. 2066
(13) Malloy, op. cit., p. 2131
(14) Malloy, op. cit., p. 2918
(15) Malloy, op. cit., p. 2889
(16) U. S. Stat. a. L. vol. 47, part 2, p. 1901
(17) Malloy, op. cit., p. 3100
(18) Malloy, op. cit., p. 1924
(19) Malloy, op. cit., p. 2140
(20) Malloy, op. cit., p. 2214
(21) Missouri v. Holland, 252 U.S. 416, 64 L. Ed. 641 (1920).
(22) General Electric Co. v. Robertson, 21 Fed. (2d) 214, Dist. Ct. D. Md. (1927)
(23) James T. Shotwell: The Origins of the International Labor Organization, 1934, Vol. II. pp. 11-12.

occasions at the end of the 19th century. The Swiss government was especially active in initiating conferences aiming at international regulation of some labor conditions. One of the conferences called by that government was transferred to Berlin at the request of the German Emperor in 1890.

In 1882 and 1897 France and Belgium, with a view to protecting migratory workers, concluded agreements insuring to depositors in savings banks greater facilities for deposit, transfer, and repayment. In 1904 France and Italy entered into an agreement which in addition to facilitating transfer of monies deposited in savings banks regulated questions of workmen's pensions in case of migration, workmen's compensation for accidents, unemployment payments, protection of minors employed in industries, the development of an inspection service in factories, and publication of annual reports on the application of the laws and regulations relating to the work of women and children. Numerous agreements, chiefly relating to accident insurance, were thereafter signed between various European countries in the years 1904 to 1913 of which 16 were enumerated in the report to the Leeds Conference. There was also a treaty entered into between the Transvaal and Mozambique for the protection of native laborers. The Franco-Danish Treaty of Arbitration entered into in 1911 provided among the matters subject to arbitration, those relating to the international protection of workers. In 1906 two conventions were entered into in Berne, Switzerland; one prohibited the use of white phosphorus in the manufacture of matches which has now been adhered to by thirty-one countries; the other prohibited night work for women which also has been adhered to by a substantial number of nations. In 1913 another Conference was held at Berne, Switzerland, composed of experts representing governments whose purpose it was to formulate additional international agreements prohibiting night work by young workers and fixing a ten-hour day for women. That Conference was to be followed by a conference of diplomats for the purpose of entering into international conventions, but the World War put an end to further steps in that direction until the creation of the International Labor Organizations.

Article XIII of the Treaty of Versailles is the Constitution of the International Labor Organization. The first Conference of that organization was held in Washington, D. C., in 1919 and at that session six conventions were drafted and submitted to members for signature. When the United States refused to ratify the Treaty of Versailles it also severed its connection with the International Labor Organization. But on August 20, 1934, the United States resumed the connection and became a member of the organization. The following is a list of the conventions drafted by the International Labor Organization together with the year when each convention went into effect and the number of nations that had ratified each convention by July 1935. (24)

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(24) International Labor Organization, Draft Conventions and Recommendations Adopted by the International Labor Conference at its Eighteen Sessions held 1919-1934. International Labor Office, Geneva, 1934; The Progress of Ratifications, International Labor Office, July 1935.

Number of convention.	Subject-matter.	Came into force in the year.	Total number of ratifications.
1.	Limits the hours of work in industrial undertakings to 8 in the day & 48 in the week.....	1921	22
2.	Concerning unemployment.....	1921	30
3.	Concerning employment of women before and after child-birth.....	1921	16
4.	Prohibiting the employment of women in industrial undertakings during the night.....	1921	30
5.	Fixing the minimum age for admission of children to industrial employment.....	1921	26
6.	Concerning night work of young persons employed in industrial undertakings.....	1921	30
7.	Fixing the minimum age for admission of children to employment at sea.....	1921	28
8.	Concerning unemployment indemnities in case of loss or foundering of ship.....	1923	22
9.	Establishing facilities for finding employment for seamen.....	1921	23
10.	Concerning age of admission of children and minors in agriculture.....	1923	17
11.	Concerning rights of association and compensation of agricultural workers.....	1923	27
12.	Concerning workmen's compensation in agriculture.....	1923	19
13.	Concerning the use of white lead in painting	1923	23
14.	Concerning the application of the weekly rest in industrial undertakings.....	1923	26
15.	Fixing minimum age for the admission of young persons to employment as trimmers or stokers..	1922	28

Number of convention.	Subject-matter.	Came into force in the year.	Total number of ratifications.
16.	Medical examination of children and young persons employed at sea	1922	26
17.	Concerning Workmen's Compensation for Accidents	1927	16
18.	Concerning Workmen's Compensation for Occupational Diseases	1927	28
19.	Concerning equality of treatment of national and foreign workers as regards workmen's compensation for accidents	1926	34
20.	Concerning night work in bakeries	1928	10
21.	Concerning the simplification of the inspection of immigrants on board ship	1927	19
22.	Concerning seamen's articles of agreement	1928	19
23.	Concerning the repatriation of seamen	1928	16
24.	Concerning sickness insurance for workers in industry and commerce and domestic servants.	1928	16
25.	Concerning sickness insurance for agricultural workers	1928	11
26.	Concerning the creation of minimum wage fixing machinery	1930	18
27.	Concerning the marking of the weight on heavy packages transported by vessels	1932	30
28.	Concerning protection against accidents or workers employed in loading or unloading ships	1932	4
29.	Concerning forced or compulsory labor	1932	16
30.	Concerning regulation of hours of work in commerce and offices	1933	6

Number of convention.	Subject-matter.	Came into force in the year.	Total number of ratifications.
32.	Concerning the protection against accidents of workers employed in loading or unloading ships, revises No. 28.....	1934	5
33.	Concerning the age of admission of children to non-industrial employment.....	1935	3

In view of all those bona fide agreements entered into between and among numerous nations and in force for long periods of time it seems clear that labor conditions have become a proper subject of international negotiations and treaties. Of course, the question as to "propriety" or "impropriety" discussed herein is not based on any rule of international law; it is based on the constitutional law of the United States and arises because of our federal system of government. Though the Supreme Court has never held any treaty invalid on any ground, the statements of that court, concurred in by practically every writer on the subject, indicate that the Supreme Court will inquire into the "propriety" of labor conditions as a subject for an international treaty.

CHAPTER II.

HAVE THE STATES POWER, WITH CONSENT OF CONGRESS, TO ENTER INTO AGREEMENTS OR COMPACTS WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS?

The Constitution of the United States, Article I, Section 10, provides:

> "No State shall enter into any Treaty, Alliance or Confederation: ...
>
> "No State shall, without the Consent of Congress, .. enter into any Agreement or Compact with another State, or with a foreign Power, ..."

A State may not enter into a treaty but it may enter into an agreement or compact with consent of Congress. What is the difference between a "treaty" and an "agreement or compact"? Is not every treaty an agreement? Mr. Justice Sutherland said in 1919:(25)

> "...The line of separation between those compacts with foreign powers which may be made, with the consent of Congress, and those which, being 'treaties' may not be made by any state under any conditions, has never been drawn, and remains vague and indefinite."

An attempt will be made here to draw that line.

Since the Constitution sheds no light on the subject one naturally turns to the proceedings of the federal convention. That convention began its deliberations in Philadelphia in May, 1787. The period till July 26 was devoted to a general discussion of fundamental issues. Treaties were mentioned in connection with their supremacy over State legislation and in connection with which organs of the federal government should be entrusted with the power to make treaties, as will appear in more detail in the next chapter; but nobody seems to have mentioned "agreements or compacts". On July 26 a Committee on Detail was created and the Convention adjourned till August 6th "that the Comm. of detail might have time to prepare and report the Constitution."(26) The Committee on Detail consisted of five members: John Rutledge of South Carolina, Chairman; James Wilson of Pennsylvania, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, and Oliver Ellsworth of Connecticut. Several of the outlines and drafts prepared by some of those men have been preserved. The first time that the distinction between "treaties" and "agreements and compacts" was introduced appears to have been in connection with a draft of the Constitution in the handwriting of James Wilson.(27) Section 10 of that draft read as follows:

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(25) George Sutherland: Constitutional Power and World Affairs (1919) p. 121.
(26) Farrand: The Records of the Federal Convention, v. 2, p. 128
(27) Farrand: The Records of the Federal Convention, Vol. 2, p. 169

"10. No State shall enter into any Treaty, Alliance or Confederation; nor lay any Imposts or Duties on Imports..."

The draft shows emendations in the handwriting of Rutledge, made presumably after discussion with Wilson and other members of the Committee. Those changes made the section read as follows:

"10. No State shall enter into any Treaty, Alliance, Confederation with any foreign Power nor witht. Const. of U. S. into any agreement, or compact with another State or Power; nor lay any Imposts or Duties on Imports;..."

On August 6, 1778, Rutledge in behalf of the Committee on Detail reported to the Convention and submitted a draft of a Constitution which contained Sections XII and XIII reading as follows:(28)

"XII. No State shall coin money; ... nor enter into any treaty, alliance or confederation; ...

"XIII. No State, without the consent of the Legislature of the United States, shall emit bills of credit ...; nor enter into any agreement or compact with another State, or with any foreign power. ..."

The Convention continued its deliberations from August 6, till September 17, numerous changes and amendments were made, the "Committee of revision or Stile & arrangement" was created which included in its membership Madison and Hamilton, the committee went over the document and reported September 12,(29) but nothing appears to have been said or done by anybody about "agreements or compacts", and finally the provision was included in the Constitution as approved by the convention on September 17, 1787.

In the State conventions called to ratify the federal Constitution there appears to have been no discussion or reference to "agreements or compacts." (30)

Samuel Johnson: "A Dictionary of the English Language", 2nd ed., London, 1756, contains the following:

"Agreement ... Compact; bargain, conclusion of controversy; stipulation.

"Compact ..... A contract; an accord; an agreement; a mutual and settled appointment between two or more, to do or to forbear something.

"Treaty..... A compact of accommodation relating to public affairs."

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(28) Farrand, op. cit. vol. 2, p. 187
(29) Farrand, op. cit. vol. 2, p. 590, note 8.
(30) Jonathan Elliott: Debates on the Federal Constitution.

That dictionary obviously throws no light on the question.

The Articles of Confederation adopted in 1777 contained the words "agreement" and "treaty":

> "Article VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state...
>
> "No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes of which the same is to be entered into, and how long it shall continue.
>
> "No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain...
>
> "Article IX. The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article - of sending and receiving ambassadors - entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever...
>
> "The United States in Congress assembled shall never engage in a war - nor enter into any treaties or alliances... unless nine States assent to the same..."

Though the first paragraph of Article VI mentions both an agreement and a treaty, it contains no clue as to what the differences between them might be.. On the contrary, it creates the impression that the word "agreement" was inserted as a catch-all term to include every possible understanding. But a consideration of the various drafts that preceded the final form of the Articles of Confederation and a comparison of the Articles with the Constitution show a curious consistency in the use of the term "agreement".

The first elaborate draft of the Articles of Confederation was submitted to the Continental Congress on July 12, 1776 (31) and was soon thereafter printed. It contained the following:

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(31) Journals of the Continental Congress, vol. V. pp.547,549,550,555.

"Art. IV. No Colony or Colonies, without the Consent of the United States assembled, shall send any Embassy to or receive any Embassy from, or enter into any Treaty, Convention or Conference with the King or Kingdom of Great-Britain, or any foreign Prince or State; ---

"Art. V. No two or more Colonies shall enter into any Treaty, Confederation or Alliance whatever between them, without the previous and free Consent and Allowance of the United States assembled, specifying accurately the Purposes for which the same is to be entered into, and how long it shall continue.

"Art. XV. When the Boundaries of any Colony shall be ascertained by Agreement, or in the Manner hereinafter directed, all the other Colonies shall guarantee to such Colony the full and peaceable Possession of, and the free and entire Jurisdiction in and over the territory included within such Boundaries.

"Art. XVIII. The United States assembled shall have the sole and exclusive Right and Power of ... Sending and Receiving Ambassadors under any Character - Entering into Treaties and Alliances - Settling all Disputes and Differences now subsisting, or that hereafter may arise between two or more Colonies concerning Boundaries, Jurisdictions, or any other Cause whatever. --- The United States assembled shall never engage the United Colonies in War, --- nor enter into Treaties or Alliances ... unless the Delegates of nine Colonies freely assent to the same..."

The second printed draft was considered by the Continental Congress on August 20,1776, (32) and contained the following provisions:

Article IV. No State, without the consent of the United States in Congress Assembled, shall send any Embassy to or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any King, Prince or State; ...

"Article V. No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the Consent of the United States in Congress Assembled, specifying accurately the purposes for which the same is to be entered into and how long it shall continue.

"Article XIV. The United States Assembled shall have the sole and exclusive right and power of ... sending and receiving Ambassadors - entering into treaties

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(32) Journals of the Continental Congress, Vol. V. pp. 675,676,681

> and Alliances - deciding all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundaries, jurisdictions, or any other cause whatever - . . . The United States in Congress assembled shall never engage in a war, . . . nor enter into treaties or alliances except for peace . . . unless nine States assent to the same;"

Article XV of the first printed draft was omitted in the second printed draft. Subsequently and on November 15, 1777, the Continental Congress considered a report which differed slightly from the final form of the Articles of Confederation and then Adopted the Articles in their final form. (33)

The right to enter into "agreements" was limited only as between a State and a foreign power, consent of Congress being required (Article IV of the second printed draft, Article VI of the final form, Article IV of the first printed draft where the word "convention" is used instead of "agreement".) In no draft was the word "agreement" used when limitations were imposed on the right of the colonies of the states to make arrangements among themselves (Article IV of first printed draft, Article V of second, Article VI of final form); in other words, "agreements" of the colonies or states among themselves were permitted without any limitation whatever. The fact that the draftsmen of the Articles of Confederation while working on three different drafts in the period of one and one-half years consistently gave the States a limited right to enter into agreements with foreign powers, and gave them an unlimited right to enter into agreements among themselves and the further fact that ten years later, in the Constitution, the rights of the States to enter into agreements among themselves became limited, show that the men of those times used "agreement" as if the word had a distinct and clear meaning for them and not merely as a catch-all term to supplement others.

Apart from the Articles of Confederation and the drafts that preceded the let us consider the federal convention of 1787. In that assembly were many good, and some excellent, lawyers. They weighed words with the utmost care for weeks and months. The language which forbade treaties but permitted agreements or compacts with consent of Congress was before those lawyers for six weeks, from August 6 till September 17. Though to us the language suggests no distinction at all, they approved it without any question.

The only reasonable explanation of this phenomenon is that the words "agreements or compacts" in contrast to "treaties" were used as technical terms taken from the field of international dealings, that they were words of art, carried a definite meaning and therefore called for no discussion.

To ascertain that meaning one must obviously turn to the literature on international law in existence in 1787 and known in this country at that time. Somewhere among the classifications of treaties and international agreements there may be a classification that will fit the distinction underlying the constitutional provisions in question. Many writers whose works were in existence at that time appear not to have discussed classifications of international agreements and treaties, or if they did, those classifications can

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(33) Journals of the Continental Congress, Vol. IX, pp. 907-925.

by no stretch of the imagination be used to explain the difference between "treaties" and "agreements or compacts". They are: Giovanni da Legnano, (34) Balthazar Ayala, (35) Alberico Gentili, (36) Richard Zouche, (37) Samuel Pufendorf, (38) Samuel Rachel, (39) Johann Wolfgang Textor, (40) Cornelius Van Bynkershoek (41) and J. J. Burlamaqui (42) Hugo Grotius (43) distinguished federa, treaties, from pactiones aliae, other agreements. Though the terms remind us of the language used in the constitutional provision the definition given by Grotius could not possibly be relied on by the framers of the constitution because of the remoteness of the subject matter embraced in the definitions. His follower and annotator Jean Barbeyrac (44) did not change the definitions.

Christian L. B. de Wolff (45) distinguished between "federa" and "pactiones" and defined them in a way that appears relevant to the constitutional provision but there seems to be no proof that Wolff's work was known in this country in 1787.

Another author was Emeric de Vattel. (46) The circumstances under which his work became known in this country are recited by Albert de Lapradelle in his introduction to the edition of Vattel's work published by the Carnegie Endowment for International Peace, at page XXIX:

"...From 1758 to 1776 Grotius, Pufendorf, and Burlamaqui were read, studied, and commented upon in the English colonies of America, but Vattel, at the time, seems to have been unknown to them.

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(34) Tractatus De Bello De Represaliis et de Duello, 1360, published by Carnegie Endowment for International Peace, 1917.
(35) De Jure et Officiis Bellicis et Disciplina Militari, 1581, edition of Carnegie Endowment, 1917.
(36) De iure belli, 1598, edition of Carnegie Endowment, 1933.
(37) Iuris et Iudicii Fecialis, sive, Iuris inter Gentes, et Quaestionum de Eodem Explicatio, 1650, edition of Carnegie Institution, 1911.
(38) De Jure Naturae et Gentium, 1672, edition of Carnegie Endowment, 1934.
(39) De Jure Naturae et Gentium Dissertationes, 1676, edition of Carnegie Endowment, 1916.
(40) Synopsis Juris Gentium, 1680, edition of Carnegie Endowment, 1916.
(41) Quaestionum juris publici libri duo, 1737, edition of Carnegie Endowment 1930.
(42) Principes du droit de la nature et des gens et du droit public general, 1737.
(43) De Jure Belli et Pacis, 1625, ed. of Carnegie Endowment, 1925, book II, chs. XV, XX, XXI, (X,XI).
(44) Le Droit de la Guerre et de la Paix par Huges Grotius, Amsterdam, 1724, Vol. 1, p. 474.
(45) Jus Gentium, methodo scientifica pertractatum, 1749, ed. of Carnegie Endowment, 1934, ch. IV, sec. 369.
(46) Le Droit des Gens ou principes de la loi naturelle, 1758, ed. of Carnegi Endowment, 1916.

In 1773 the Law of Nations was taught at Kings College (now Columbia University). In 1774 Adams, and in 1775 Hamilton, quote or praise Grotius, Pufendorf, Locke; neither mentions Vattel. But the War of Independence gave the United Colonies the new name of States. A hard task engaged the American people, who, by the study of the Law of Nature and of Nations, were preparing themselves for the great work of independence. Anxious to build upon solid foundations, their statesmen turned to European publicists. Charles F. W. Dumas, a Swiss living in Holland, and an ardent republican, reread Vattel with the United States in mind, brought out a new edition with notes inspired by recent events, and sent three copies of it to Franklin."

The letter by Benjamin Franklin to Dumas acknowledging receipt of those copies read as follows: (47)

"Philadelphia, December 19, 1775.

"Dear Sir:

...I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept (after depositing one in our own public library here, and sending the other to the College of Massachusetts Bay, as you directed) has been continually in the hands of the members of our Congress now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author..."

With reference to the copy given to the library the following is of interest:

"...This copy (presented by Dumas to the Philadelphia library) undoubtedly was used by the members of the Second Continental Congress, which sat in Philadelphia; by the leading men who directed the policy of the United Colonies until the end of the war; and later by the men who sat in the Convention of 1787 and drew up the Constitution of the United States, for the library was located in Carpenter's Hall, where the First Congress deliberated, and within a stone's throw of the Colonial State House of Pennsylvania, where the Second Congress met, and likewise near where the Constitution was framed." (48)

James Wilson, a member of the Committee on Detail, was familiar with Vattel. He was the author of the draft of the Constitution in which the phrase "agreements and compacts" appears for the first time though in the handwriting of Rutledge, chairmen of the Committee. In the Pennsylvania Convention called to ratify the Federal Constitution, on December 4, 1787. (49) Wilson referred to "All the political writers from Grotius and Pufendorf down to Vattel". He had to be well versed in international law. "In 1779 he was commissioned advocate-general for France and in this capacity he represented Louis XVI in all claims arising out of the French alliance until

(47) Wharton: United States Revolutionary Diplomatic Correspondence, 1889, v. 2, p. 64.
(48) Introduction to Vattel's book, ed. of Carnegie Endowment, vol. III, P.XXX, note 1
(49) Elliott's Debates on the Fede al Constitution, vol. 2, p. 454.

the close of the war." (50) The chairman of the Committee, John Rutledge, had studied law in England, was a delegate from South Carolina to the Continental Congress for three years, was Chief Justice of the highest court of South Carolina, 1791-1795, and in the latter year served as Chief Justice of the Supreme Court of the United States during one term. (51) Oliver Ellsworth, another member of the Committee, had been a delegate to the Continental Congress from Connecticut for six years, a judge of the Supreme Court of Error of Connecticut, and in 1796 was appointed Chief Justice of the Supreme Court of the United States. (52) In all likelihood those men were familiar with Vattel's work in 1787.

Vattel was referred to in the debates of the South Carolina convention called to ratify the federal Constitution. (53)

Book II, Chapter XII of Vattel's work contains the following:

"Sec.152. Treaties of Alliance and other public treaties. —— A treaty, in Latin foedus, is a pact entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time.

"Sec.153. "Compacts, agreements or conventions. Pacts which have for their object matters of temporary interest are called agreements, conventions, compacts. They are fulfilled by a single act and not by a continuous performance of acts. When the act in question is performed these pacts are executed once for all; whereas treaties are executory in character and the acts called for must continue as long as the treaty exists.

"Sec.192. Treaties executed by an act done once for all. Treaties which do not call for continuous acts, but are fulfilled by a single act, and are thus executed once for all, those treaties, unless indeed we prefer to give them another name, (See Sec.153), those conventions, those pacts which are executed by an act done once for all and not by successive acts, are, when once carried out, fully and definitely consummated. If valid, they naturally bring about a permanent and irrevocable state of things. ..." (54)

The original French text is as follows:

"§ 152. Des Traités d'Alliance & autres Traités Publics. ... Un Traité, en Latin Foedus, est un Pacte fait en vue du bien public, par les Puissances supérieures, soit a perpétuité, soit pour un temps considérable.

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(50) The Encyclopedia Britannica, 1929, vol. 23, p. 631.
(51) Dictionary of American Biography, 1935, v.16, pp. 258-259.
(52) Dictionary of American Biography, 1931, v. 6, pp.112-114.
(53) Elliott's Debates on Federal Convention, vol. IV, p.277-8, 310.
(54) The translation is that accompanying the edition of the Carnegie Endowment for International Peace except that the word "pacte" I translate as "pact", "paction" as "compact", whereas in that translation "pacte" is "compact", "paction" is "arrangement". My translation is equally correct and it brings out more clearly the relationship between Vattel's ideas and the language of the constitutional provisions.

"§ 153. Des pactions, accords, ou conventions. Les Pactes qui ont pour objet des affaires transitoires, s'appellent Accords, Conventions, Pactions. Ills S'accomplissent par un acte unique, & non point par des prestations réiterees. Ces Pacts se consomment, dans leur exécution, une fois pour toutes; Les Traités reçoivent une exécution successive, dont la durée égale celle du Traité.

"§ 192. Des Traités accomplis une fois pour toutes & Consommés. Les Traités qui ne concernent point des prestations réiterées, mais des actes transitoires, uniques & qui se consomment tout d'un coup, ces Traités, si toutefois on n'aime mieux les appeller d'un autre non (voyez le § 153): ces Conventions, ces Pactes, qui s'accomplissent une fois pour toutes, & non par des actes successifs; des qu'ils one reçu leur exécution, sont des choses consommées & finies. S'ils sone valides, ils ont de leur nature un effet perpétuel et irrévocable; ..."

It is my contention that the "agreement or compact" mentioned in the Constitution is the "agreement, convention, compact" described in secs. 153 and 192 of Vattel, his "accord, convention, paction."

What were the kinds of treaties that loomed large in the minds of the framers? There were treaties of peace, of amity and commerce, consular conventions, treaties of navigation. Under the Articles of Confederation such treaties had been negotiated. (55) It was not wise to leave the door open for States to enter into that kind of treaties. But there were other matters with which not only the framers were familiar but even the man on the street, and they were boundary disputes. The colonies and the States were continually engaged in such disputes. Colonies tried to settle many by agreements, so did States. (56) Such agreements necessarily involved frequent cession of strips of land on one side or the other of the agreed boundary line.

Obviously a way had to be left open for the States to settle such disputes by agreements either among themselves or with a neighboring foreign nation and the framers wanted to permit such agreements with consent of Congress. Enumeration of kinds of treaties forbidden or permitted carries the danger that some other kind of treaty may develop for which there will be no provision. The framers therefore preferred to use generic terms to include the treaties they had in mind and similar ones. They had before them the bible of international law, the books of a recognized authority, Vattel, and he described a category of international arrangements, called "accord, convention, paction", which were fulfilled by a single act and not by a continuous performance of acts; when the act in question was performed, such agreements were executed once for all (sec. 153), if valid they brought about a permanent and irrevocable state of things (sec. 192). That category clearly

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(55) Charles Henry Butler: Treaty Making Power of the United States (1902), Vol. 1, secs. 158-160; Crandall: "Treaties, Their Making and Enforcement" (1916) sec. 17.

(56) The intercolonial agreements enumerated by Frankfurter and Landis in The Compact Clause of the Constitution, 34 Yale Law Journal 685 (1925) at pp. 730-732 involved fixing of boundary lines; so did three out of the four interstate agreements under the Articles of Confederation there enumerated, pp. 732-734, the fourth regulated largely matters that arose in connection with the boundary.

described boundary settlements including cessions or exchanges of land connected with such settlements, and so the framers used the words "agreement or compact". The other treaties, of peace, commerce, etc. they simply called "treaty" just as Vattel did in sec. 152. Consequently they prohibited a State from making a treaty but permitted making an agreement or compact with consent of Congress.

Of great corroborative value is the fact that one of the earliest systematic commentators on the Constitution after its ratification, St. George Tucker, who was a contemporary of the men who drafted the Constitution, expressly referred to "Vattel, 296, 297" when discussing "treaties" as distinguished from "agreements or compacts". (57)

When the first printed draft of the Articles of Confederation uses the word "convention" (Art. IV) and the second printed draft (Art. IV) and the final form (Art. VI) use the word "agreement", the words mean the same thing, being taken from Vattel's trio, "accord, convention, paction." When the first draft (Art. IV) refers to the mutual ascertaining of boundaries among colonies the word used is "Agreement."

No State appears to have asked Congress for its consent to an agreement or compact with a foreign power and Congress never gave such consent. There have been cases holding void agreements by a State, without consent of Congress, to extradite a single fugitive from justice. (57a) They do not imply that with consent of Congress such agreements would be valid. There has been no judicial determination upholding such an agreement or compact. Therefore there is no authoritative pronouncement as to what specific subject-matter may be agreed upon between a State and a foreign power with consent of Congress. In the absence of such an authoritative pronouncement secs. 153 and 192 of Vattel's book should be the guide in interpreting the clause "compact or agreement. . .with a foreign power."

The question might be raised why matters which "bring about a permanent and irrevocable state of things" (Vattel, book II, Sec. 192) are called "affaires transitoires", transitory matters. (sec. 153) When this word is taken literally it certainly does not fit the category. What is permanent is not transitory. Story (58) took the word literally and therefore rejected the

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(57) St. George Tucker: Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (1803), vol. 1, Appendix p. 309. Pages "296, 297" in the English translation of Vattel's book published in Dublin in 1792 contain secs. 152-156.

(57a) Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579 (1840); People v. Curtis, 55 N.Y. 321 (1872). In the Holmes case Taney Ch.J. quoted a few sections from Vattel including secs. 152-153 preceded by the following remarks: "A few extracts from an eminent writer on the laws of nations, showing the manner in which these different words (treaty, agreement, compact) have been used, and the different meanings sometimes attached to them, will, perhaps, contribute to explain the reason for using them all in the Constitution."

(58) Story: Commentaries on the Constitution of the United States, 4th ed. 1873, written about 1833, sec. 1402.

explanation advanced by St. George Tucker, supra, that "agreement or compact" refers to transitory affairs. Story asked:

> "Why may not a compact or agreement between States be perpetual? If it may not, what shall be its duration? Are not treaties often made for short periods, and upon questions of local interest, and for temporary objects?"

The truth is that the agreements described by Vattel in sec. 153 are not transitory at all in the usual sense of the word, and to the extent that the category became established in international law, the permanence of the effects of such agreements is stressed.

Wheaton states: (59)

> "Kinds of International Treaties. General compacts between nations may be divided into what are called transitory (dispositive or executed) conventions, and treaties properly so termed (sometimes called executory conventions). The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or perhaps those which create a permanent servitude in favor of one nation within the territory of another. (Vattel, Droit de Gens, liv. II, ch. 12, s. 192; Martens, Precis, liv. II, ch. 2, s. 58) The second class includes treaties relating to friendship and alliance, commerce and navigation, social and economic issues, extradition, guarantee etc."

A statement by Strupp is to the same effect: (60)

> "Häufig ist, namentlich in der älteren Literatur, die Unterscheidung in traités und pactes oder conventions (de Vattel, Droit des gens, II, chap. 12 § 152, 153, 192; Ch. de Martens, Guide diplomatique II, 1, S. 127); Wheaton, International Law III, cap. II. Ähnlich in neuerer Zeit Hartmann, Institutionen des praktischen Völkerrechts, S. 141 f.u.a.). Erstere sollen eine dauernde Tatigkeit zur Folge haben, während letztere durch einen einmaligan Akt erfüllt werden. . . ."

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(59) Wheaton's Elements of International Law (6th Ed., 1928) Vol. 1, p. 504

(60) Strupp: Wörterbuch des Volkerrechtes und der Diplomatie (1925) vol. 2, p. 651. Translation: Frequent is, especially in the older literature, the division into treaties and pacts or conventions (citation). The former are supposed to result in a continuous performance of acts while the latter are fulfilled by a single act. . . .

How then did it come about that Vattel used the word "transitory"? Vattel considered it his task to popularize and expound the teachings of Wolff. (61) Among the ways Wolff classified treaties was the following: (62)

"§ 369. Foedera quid sint; quid pactiones:

Foedus dicitur pactum a summis potestatibus boni public causa in perpetuum, vel longius saltem tempus inter se initum. Pacta vero, quae praestationes transitorias, seu non iterandas continent, Pactionum nomen retinent.

E. gr. Si duae Gentes de auxiliis in bello sibi invicem praestandis conveniunt; pactum hoc dicitur foedus; ast si gens una alteri permittit, ut ob annonae caritaten frumentum in regione sua coemat, pactio erit. Istiusmodi quoque pactio sunt induciae mortuorum sepeliundorum causa post praelium factae."

Translation: (63)

"§ 369. What treaties are; what compacts are. A treaty is defined as a stipulation entered into reciprocally by supreme powers for the public good, to last for ever or at least for a considerable time. But stipulations, which contain temporary promises or those not to be repeated, retain the name of compacts.

For example, if two nations reciprocally agree to furnish troops to each other in time of war, this stipulation is called a treaty; but if one nation permits another, on account of the high price of grain, to purchase in its territory, this will be a compact. A compact of that sort, also, is the truce made after a battle for the purpose of burying the dead."

The examples given by Wolff certainly justify his characterizing the subjects of a compact as transitory; burying the dead after a battle, purchasing grain because of temporary scarcity, are activities of a passing character. Wolff also describes them as "non iterandas", that is, such as need not be repeated. This latter characterization may refer to the same two examples, or it may refer to a different category, to-wit: to a category of promises that are fulfilled by a single act like cession of territory,

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(61) See introduction by Albert de Lapradelle to the edition of Vattel's book by Carnegie Endowment for International Peace of 1916.
(62) Christian L.B. de Wolff: Jus Gentium, methodo scientifica pertractatum, 1749, ch. IV, sec. 369.
(63) Accompanies edition of Wolff's Jus Gentium by Carnegie Endowment, 1934.

fixing a boundary line, and therefore need not be repeated. Vattel used the word "transitory" but omitted the examples which explained it. At the same time he developed the "non-iterandas" part of the definition by specifying that the agreements he discussed were performed by a single act, once for all. It is not important whether he correctly or incorrectly interpreted Wolff. What is important is that to the framers of the Constitution and to the lawyers of those times the category of international agreements called by Vattel "accord, convention, paction" was clearly enough described, it fitted a kind of agreement into which they desired the States to be in position to enter, with consent of Congress, and they consequently used that technical term without any opposition from anybody.

We may now consider agreements or compacts between a state and a foreign nation regulating labor conditions in the light of Vattel's description of an "agreement, convention, compact". Is an agreement or compact regulating labor conditions fulfilled by a single act or does it call for a continuous performance of acts? (Vattel, sec. 153). The answer is clear. Such an agreement or compact calls for a very complicated course of conduct and for a multitude of acts which must be continuously performed. Does such an agreement or compact bring about a permanent and irrevocable state of things (Vattel, sec. 192; Wheaton, p. 28 of this paper) with the result for instance, that such a state of things will survive a war? Obviously not.

Agreements or compacts regulating labor conditions do not fall within the group of "agreements, conventions, compacts" described by Vattel and therefore do not fall within the group of "agreements or compacts" which a State may enter into with consent of Congress.

CHAPTER III.

HAS THE FEDERAL GOVERNMENT POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESSES THE REGULATION OF WHICH HAS BEEN RESERVED TO THE STATES?

We live under a dual system of government. Some powers have been delegated to the federal government by the Constitution of 1787 with the result that others remain with the States or with the people. This theory of government was made perfectly clear by the 10th amendment proposed by Congress in 1789 and ratified in 1791; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The power "to make treaties" was delegated to the United States. "He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur; (Constitution, Art. II, sec. 2). In addition, that power was prohibited to the States. "No State shall enter into any Treaty, Alliance, or Confederation;" (Constitution, Art. I, sec. 10). Hence, the power to make treaties was not reserved to the States.

But this does not answer the question, raised from time to time, as to whether there are not limitations on the treaty power of the federal government due to the reservation of certain other powers in the States. When a State passes a law as to a subject matter concededly within its jurisdiction and the federal government enters into a treaty with reference to the same subject matter to take effect in that very State and there is a conflict between the State law and the treaty, which shall prevail? The Constitution provides (Art. VI). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This language would indicate that in case of conflict the treaty is supreme. But then the further argument is raised that a treaty is supreme only if made "under the authority of the United States," that this phrase refers to authority exercised in accordance with the Constitution, that under the Constitution certain matters are reserved to the States, that a treaty which attempts to regulate such matters is not made in accordance with the Constitution and therefore is not made "under the authority of the United States"; hence, that it is not "the supreme law of the land", and the State law does not yield to the treaty.

This problem has come before the Supreme Court of the United States in many cases and of course its holdings are the only authoritative answer. It may not be amiss, however, to touch for a moment on the general situation in 1787 and the expressed intentions of the framers of the Constitution.

Under the Articles of Confederation, Art. IX, supra, (64) the United States had:

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(64) page 15.

". . . the sole and exclusive right and power of entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever."

There was no provision concerning treaties being the supreme law of the land. Whether or not they were, was a subject of debate. Some States passed laws to the effect that certain treaties were the supreme law of the land or else passed laws giving effect to the treaties. Others claimed the right to interpret treaties and passed statutes in derogation of treaties or left such statutes unrepealed. While the treaty of peace with Great Britain of 1783 called for no confiscation of property of British citizens and also for no impediments in their collection of debts, several States disregarded those provisions. (65) Because of that failure to comply with the treaty, said the British, they were justified in not vacating certain forts on the frontier. Thus it was difficult to negotiate treaties with other nations when it appeared that the United States Government had no power to enforce its treaties in the United States.

In the initial stages of the debates in the federal convention that problem was tied up with the general problem of enforcing federal statutes which were in conflict with State statutes. The so-called Virginia plan as adopted by the Committee of the Whole on May 31 and June 8, 1787 (66) contained the following:

"...RESOLVED, that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union or any Treaties subsisting under the authority of the union..."

In behalf of the smaller States Patterson of New Jersey submitted the following as a part of the so-called New Jersey plan: (67)

"RESOLVED that all Acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the articles of confederation vested in them, and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent the carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth the power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties."

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(65) Ware v. Hylton, 3 Dall. 243, 1 L.Ed. 568 (1796)
(66) Max Farrand: Records of the Federal Convention, Vol. I, pp. 47, 152
(67) Farrand, op.cit. Vol I, p. 245

Apparently the followers of both plans recognized that State laws had to yield to treaties and this was, by implication, the intent of a plan submitted by Hamilton. (68)

In the Committee of Detail (July 26 - August 6, 1787) there seems to have been an intention to enumerate the kinds of treaties the draftsmen had in mind. Randolph wrote in a draft: (69)

"The powers destined for the senate (70) peculiarly, are

(1) to make treaties of commerce
(2) to make peace." (Changed in the handwriting of Rutledge to read)

"to make Treaties of peace and Alliance".

Wilson wrote: (71)

"The Senate of the United States shall have power to make Treaties of Peace, of Alliance, and of Commerce..."

Apparently those efforts were abandoned and the language used in the ultimate form gives the federal government power "to make treaties". The word "treaties" was here used in the most comprehensive sense, not in the sense of treaties proper as distinguished from agreements or compacts. (See preceding chapter). Vattel also used the word "traite" in the most comprehensive sense as including all international agreements (sec. 192) and more narrowly as treaties proper (sec. 152). (72)

At no time did the remarks of the members of the federal convention indicate that they thought the treaty power was subject to powers reserved to the States. On the contrary, quite a few remarks indicated the opposite. For instance, on August 15, 1787, Col. Mason seconded a motion which limited to the House of Representatives the right to initiate bills for raising and appropriating money and to fix salaries of government officials. (73) "Col. Mason 2ds the motion. He was extremely earnest to take this power from the Senate, who he said could already sell the whole country by means of Treaties." On August 23, 1787 Wilson spoke in support of an amendment to the clause: "The Senate of the United States shall have power to make treaties" and said: (74) "Under the clause, without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port". The amendment was to add the proviso "but no Treaty shall be binding on the United States which is not ratified by law" but the amendment was voted down.

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(68) Farrand, Vol. I, pp. 291-293
(69) Farrand, Vol. I, p. 144
(70) At that time the prevailing view was that the treaty-making power was to be given to the Senate. Hamilton urged that the power be shared by the Senate and the supreme Executive Authority
(71) Farrand, Vol. I, p. 155
(72) page 24, supra
(73) Farrand, Vol. II, p. 297
(74) Farrand, Vol. II, p. 393

In the Virginia convention held to ratify the Constitution Mason Said: (75) "Will any gentleman say that they may not make a Treaty, whereby the subjects of France, England and other powers, may buy what lands they please in this country?" (76) Some feared dismembering of the Union by virtue of the treaty power but Madison assured them that the power did not extend so far. (77)

With this brief reference to the proceedings of the various conventions as a background (78) let us consider the decisions of the Supreme Court grouped according to the subject matter of the State rights involved.

A. Confiscation of enemy property. In 1774 Virginia, then engaged in the Revolutionary War with Great Britain, confiscated debts due to British creditors. The treaty of peace of 1783 entered into between Great Britain and the United States provided "that the creditors of either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts theretofore contracted. In an action by a British creditor against a citizen of Virginia on a pre-war bond it was held that the treaty overrode the Virginia statute and judgment for the defendant was reversed. (79) The same was held with reference to a Maryland statute. (80) Property of a British charitable corporation located in Vermont was declared by the legislature of Vermont in 1794 to have become property of the State at the time of the revolution because of the alienage of the corporation, and then (in 1794) the legislature granted the property to the town of New Haven. The Supreme Court held the grant void because private titles to property were not affected by the revolution and were protected by the treaty of peace of 1783 which provided: "There shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by the reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property . . ." (81)

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(75) Elliott's Debates on the Federal Convention, Vol. III, p. 503
(76) The Supreme Court later held that such a treaty could be made. Chirac v. Chirac, 2 Wheat. 259, 4 L.Ed. 234 (1817)
(77) Elliott's Debates, Vol. III, p. 514
(78) Apart from the source-books already mentioned by Farrand and Elliott the materials bearing on the question discussed in this chapter have been industriously collected and thoroughly considered in several works, notably in Charles Henry Butler: The Treaty-Making Power of the United States (1902); Henry St. George Tucker: Limitations on the Treaty-Making Power under the Constitution of the United States (1915); William E. Mikel: The Extent of the Treaty-Making Power of the President and the Senate of the United States, Univ. of Pa. Law Review and American Law Register, Vol. 57, pp. 435, 528 (1909); Charles H. Burr: The Treaty-Making Power of the United States and the Methods of its Enforcement as Affecting the Police Powers of the States, Proceedings of the American Philosophical Society, Vol. 51, p. 271 (1912); Edward S. Corvin: National Supremacy, Treaty Power vs. State Power (1913).
(79) Ware v. Hylton, 3 Dall. 243, 1 L.Ed. 568 (1796)
(80) Clarke v. Harwood, 3 Dall. 342, 1 L.Ed. 628 (1797)
(81) The Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheat. 464, 5 L.Ed. 662 (1823)

B. State Statutes of Limitations. In Hopkirk v. Bell, 3 Cranch 454, 2 L.Ed. 497 (1806) the defendant, Bell, had signed a promisory note in 1773 for a debt of his father, and provided therein "I am not to pay the above till it is convenient". The holders of the note who were subjects of Great Britain commenced action in 1803 and the Virginia five year statute of limitations was pleaded as a bar. The treaty between the United States and Great Britain entered into in 1783 and confirmed in 1802 provided "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts theretofore contracted". The Court held "that the length of time from the giving of the note to the commencement of the war, in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States, of 1783, does not admit of adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar:"

C. Acquisition of land by aliens. Chirac v. Chirac et al., 2 Wheat 259, 4 L.Ed. 257 (1817). An Act of Maryland of 1780 provided that French subjects who did not qualify themselves as citizens might purchase or hold lands, but only "for their respective lives, or for years". It further provided that if any French subject who should become a citizen should die intestate, "the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent and his kindred were the citizens of this state", with a proviso that whenever any French subject should, by virtue of the act, become seized in fee of any real estate, his or her interest, "after the term of ten years be expired, shall vest in the state, unless the person seized of the same shall, within that time, either come and settle in, and become a citizen of this state, or enfeoff thereof, some citizen of this or some other of the United States of America". J. B. Chirac, a native of France, migrated to Maryland in 1793, and in 1795 received a conveyance in fee of Maryland land. In 1798 he was naturalized and in July 1799 died intestate, leaving no legitimate relatives other than the plaintiffs, who were natives and residents of France. The State of Maryland conveyed the land to his natural son, J.C.F. Chirac, saving the rights of all persons claiming by devise or descent. J.C.F. Chirac entered into possession of the land. In March, 1809 the French heirs brought ejectment.

Chief Justice Marshall, speaking for an unanimous Court, held that since J. B. Chirac was not a citizen when he acquired the land, he would have acquired an estate for life only under the Maryland Act. However, a treaty between France and the United States, ratified in 1778, permitted the citizens of either country to acquire land in the other without obtaining letters of naturalization; hence, J.B. Chirac obtained title in fee in spite of the Maryland statute. His French heirs were entitled to the land under the Maryland statute, but they had to fulfill a condition subsequent, that is, they had either to settle in Maryland or enfeoff a citizen of the United States of the land within ten years, that is, before July 1809. This they failed to do and their title would have been extinguished under the Maryland statute for failure to perform the condition subsequent. However, they were helped by another treaty between the United States and France, negotiated after the expiration of the first, which again permitted the citizens of either country to inherit land in the other without being obliged to take out letters of naturalization; that treaty was held to have done away with the condition subsequent. Judgment for the plaintiffs was affirmed. Thus two separate provisions of the law of Maryland, one as to aliens purchasing land in that State and the other as to aliens inheriting land in that state were held to have been overridden by two

separate treaties entered into between the United States and France. (82)

A Swiss citizen died in Virginia in 1861 intestate, unmarried, without children and owning real estate in Virginia. The State claimed the land by escheat and obtained judgment directing sale. Then citizens of Switzerland who were heirs at law of the decedent filed a petition praying that the proceeds of the sale be paid to them. They relied on a treaty between the United States and Switzerland, made in 1850, which provided in part: "in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty..." The Virginia courts dismissed the petition. The Supreme Court of the United States reversed on the ground that the treaty gave the Swiss petitioners a right to sell the land and to withdraw the proceeds and in that respect overrode the law of Virginia; that since the law of Virginia fixed no time within which the heirs could exercise that right they could exercise it at any time. (83)

The States follow and recognize the law as laid down by the Supreme Court of the United States. (84) Of course, in the absence of a treaty, a State is free to grant or deny an alien the right to inherit land within its borders. (85)

D. Prohibition of employment of foreign laborers on public works or prohibition of employment of foreign laborers by State-chartered corporations. In 1872 the State of Oregon passed a statute forbidding contractors to employ Chinese labor "on improvement of streets and public works in this state". The statute was held void because of a treaty between the United States and China which gave the citizens of each country the right to become permanent residents in the territory of the other; this - said the Court "necessarily implies the right to live and to labor for a living". (86) The Constitution of California and a statute passed in 1880 prohibited any corporation chartered in the State from employing Chinese or Mongolians, directly or indirectly. The pertinent provisions of both constitution and statute were held void in view of the

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(82) See also Hughes v. Edwards, 9 Wheat. 489, 6 L.Ed. 142 (1824) and Corneal v. Banks, 10 Wheat. 178, 6 L.Ed. 297 (1825)

(83) Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1879)

(84) People v. Gerke, 5 Cal. 381 (1855); Wunderle v. Wunderle, 144 Ill. 40, 33 N.E. 195 (1893); Opel v. Shup, 100 Ia. 407, 69 N.W. 560 (1896). A treaty with Austria-Hungary made in 1848 was held to override the statutes of New York which denied an alien enemy the right to inherit land, even after this country had declared war against Austria-Hungary in 1917 in the absence of a proclamation suspending or abrogating the treaty. Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920) per Cardozo, J., cert. den. 254 U.S. 643, 65 L.Ed. 454 (1920)

(85) Blythe v. Hinckley, 180 U.S. 333, 45 L.Ed. 557 (1900); Wunderle v. Wunderle, supra; Opel v. Shup, supra.

(86) Baker v. Portland, 2 Fed. Cas. 472, Case No. 777, C.C., D. Oregon, (1879)

treaty between the United States and China which permitted the citizens of each country to reside in the territory of the other. (87)

E. Limiting the business of pawn brokerage to citizens of the United States. An ordinance of the City of Seattle, Washington, which in effect, limited the business of pawn brokerage to citizens of the United States, was held not to apply to a citizen of Japan because of a treaty between the United States and Japan guaranteeing the citizens of either country freedom to engage in business in the other on the same terms as are enjoyed by natives. (87a)

F. Issuance of letters of administration on estates of alien residents. Where a treaty between the United States and a foreign country gave the foreign consul a right to obtain letters of administration on the estates of his countrymen dying intestate in this country such treaty was given full effect even though the State law gave other persons the right to take out letters of administration under those circumstances. (88)

G. Taxation of aliens by States. A statute of Iowa imposed a 10% inheritance tax on estates passing to relatives who were non-resident aliens. A treaty between the United States and Denmark made in 1826 and renewed in 1857 secured to the citizens of each country the right to remove property acquired by inheritance from the territory of the other without payment of any other taxes than those paid by natives. Held, the treaty superseded the statute. (89) Similarly a California poll tax on resident aliens imposed by statute and constitution of California had to yield to a treaty between the United States and Japan which provided that the citizens of either country "shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects". (90)

H. Creation of penal law. In 1894 the Nez Parcle Indians ceded a part of their land to the United States. The agreement provided that for 25 years thereafter the federal statutes prohibiting introduction of liquor into the Indian country should continue in force in the ceded part. In 1905 a section of that land had been organized into a village under the laws of Idaho which State had full jurisdiction over the village and its inhabitants. An Indian exchanged liquor in that village and was convicted under the federal statute. The Court held that the village was not Indian country within the contemplation of the federal statute but that it must be treated as if it were Indian country because of the agreement between the

(87) In re Tiburcio Parrott, 1 Fed. 481, CCC., D. Cal. (1880)

(87a) Asakura v. City of Seattle, 265 U.S. 332, 68 L.Ed. 1041 (1923)

(88) In re Wyman, 191 Mass. 276, 77 N.E. 379 (1906); Carpigiani v. Hall, 172 Ala. 287, 55 So. 248 (1911); Infelise's Estate, 51 Mont. 18 (1915). In Rocca v. Thompson, 223 U. S. 317, 56 L.Ed. 453 (1911) the court construed a treaty not to show the intention to give the foreign consul that right and continued: "Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty with Peru in 1887 (August 31, 1887, 25 Stat. 1444), it was declared..." There was no intimation on the part of the Supreme Court that such a treaty would exceed the treaty-making power of the federal government.

(89) Nielson v. Johnson, 279 U.S. 47, 73 L.Ed. 607 (1928)

(90) Ex parte Heikich Terui, 187 Cal. 20, 200 Pac. 954 (1921)

United States and the Indian tribe. The conviction was therefore upheld. (91) A similar result was reached when the United States brought a libel to forfeit liquor introduced by a white person into a regularly organized country in the State of Minnesota. The United States relied on a treaty by which the Indians had ceded that land, with a proviso continuing in force the federal statutes against introduction of liquor into the Indian country. A judgment sustaining a demurrer to the information was reversed. (92) In the latter case the Court strongly relied on the commerce clause too, and the commerce clause was referred to in the former case. But it was admitted in both cases that there was no Act of Congress which justified the indictment or the information. In other words, the prohibitions were not enacted by Congress by virtue of its power to regulate commerce with Indian tribes. The prohibitions were created by the treaty-making power alone.

I. Regulation of fisheries on this side of the boundary line between the United States and Canada is concededly a matter for regulation by States located along the boundary line. And yet a treaty between the United States and Great Britain to regulate those fisheries was held to be within the treaty-making power. (93)

J. Regulation of migratory birds. Congress attempted to regulate the killing of migratory birds within the States but the Act was held unconstitutional in lower federal courts on the ground that it was an invasion of rights reserved to the States, the States being the owners of migratory birds. (94) Thereafter and in 1916 the United States entered into a treaty with Great Britain regulating the killing of migratory birds in the United States and Canada and in pursuance of the treaty Congress passed an Act in 1918, to give effect to the treaty. The treaty as well as the Act were held within the treaty-making power and valid. (95) Mr. Justice Holmes said in that case: "No doubt the great body of private relations usually falls within the control of the State, but a treaty may override its power".

K. Police power. There is a considerable body of dicta, originating mostly in the period of about 25 years preceding the Civil War, to the effect that the police power of the States cannot be infringed on by any act of the federal government, be it Act of Congress or treaty. (96) The phrase "police powers" is frequently employed as synonymous with "powers reserved to the States." The cases discussed so far clearly show that the treaty power is superior to powers reserved to the States. Even where the phrase is employed to describe measures which provide for health, morals, safety, etc., it is very clear that those measures being "Laws" must yield to the treaty power in accordance with the plain language of Article VI of the Constitution. There has never been a holding to the contrary. Mr. Justice Sutherland has well said with reference

(91) Dick v. United States, 208 U.S. 340, 52 L.Ed. 520 (1907)
(92) United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 23 L.Ed. 846 (1876)
(93) 22 Op. Atty. Gen. 214 (1898)
(94) United States v. Shauver, 214 Fed. 154 (D.C., E.D. Ark. 1914); United States v. McCullagh, 221 Fed. 288 (D.C., D. Kans., 1915)
(95) Missouri v. Holland, 252 U.S. 416, 64 L.Ed. 641 (1920)
(96) License Cases, 5 How. 504, 12 L.Ed. 256 (1847); Passenger Cases, 7 How. 282, 12 L.Ed. 702 (1849)

to the claim about the superiority of the police powers: (97)

> "The matter is, after all, quite simple, and resolves itself into the question whether the positive provisions of Article VI of the Constitution mean what they seem to say? By this article treaties made under the authority of the United States are declared to be the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding'. Laws of the United States made in pursuance of the Constitution and treaties made under the authority of the United States stand upon the same footing of equality. The Constitution and laws of the states are expressly made subordinate to both. No language could be more definite or final, and the conclusion is inevitable that a treaty, otherwise valid under the Constitution, is not rendered invalid because it conflicts with some provision of a state constituion or state law."

The difference between police powers and legislative powers in general is very vague. Virtually every law can be shown to relate to the welfare or health or morals of the people. Apart from that, some of the decisions clearly involve matter which ordinarily would be considered within the police power of the States, for instance, whether or not aliens should own land or engage in the pawn brokerage business, or whether liquor should be dealt with in State territory, or when inhabitants of the State may or may not shoot migratory birds. In those decisions, however, the treaty power has been uniformly upheld.

So far the Supreme Court has always recognized the superiority of the treaty-making power of the federal government over rights reserved to the States. In spite of the successive decisions of the Supreme Court the followers of the so-called State-rights doctrine have insisted that the rights reserved to the States, by virtue of the system of government or by virtue of the 10th Amendment to the Constitution, are superior to the treaty-making power. It seems that those arguments have been effectively disposed of by the opinion of Mr. Justice Holmes in Missouri v. Holland (98) already referred to on page 33 - of this paper. In that case the State of Missouri filed a bill in equity to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of 1918. The Court said, in part:

> "...the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states. To answer this question it is not enough to refer to the 10th Amendment, reserving the powers not delegated to the United States, because by article 2, § 2, the power to make treaties is delegated expressly, and by article 6, treaties made under the authority of the United States, along with the Constitution and laws of the United States, made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid, there can be no dispute about the validity of the statute under article 1, § 8, as a necessary and proper means to execute the powers of the government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground

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(97) George Sutherland: Constitutional Power and World Affairs, (1919) p. 157

(98) 252 U. S. 415, 64 L. Ed. 641 (1919)

upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution; that there are limits, therefore, to the treaty-making power; and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself, and not in pursuance of a treaty, to regulate the killing of migratory birds within the states, had been held bad in the district court. United States v. Shauver, 214 Fed. 154; United States v. McCullagh, 221 Fed. 288...

Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. Andrews v. Andrews, 188 U. S. 14, 33, 47 L. ed. 366, 370, 23 Sup. Ct. Rep. 237. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us, but only are considering the validity of the test proposed. With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment. We must consider what this country has become in deciding what that amendment has reserved...

As most of the laws of the United States are carried out within the states, and as many of them deal with matters which, in the silence of such laws, the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties, of course, 'are as binding within the territorial limits of the states as they are effective throughout the dominion of the United States'. Baldwin v. Franks, 120 U. S. 678, 683, 30 L. ed. 766, 767, 7 Sup. Ct. Rep. 656, 763. No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as Hopkirk v. Bell, 3 Cranch, 454, 2 L. ed. 497, with regard to statutes of limitation, and even earlier, as to confiscation, in Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568. It was assumed by

Chief Justice Marshall with regard to the escheat of land to the state in Chirac v. Chirac, 2 Wheat. 259, 275, 4 L. ed. 234, 238; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Blythe v. Hinckley, 180 U. S. 333, 340, 45 L. ed. 557, 561, 21 Sup. Ct. Rep. 390. So, as to a limited jurisdiction of foreign consuls within a state. Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383. See Re Ross, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to reply upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Cary v. South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403.

Decree affirmed."

From all that has been said it clearly appears that when the federal government enters into a treaty, it acts for the nation as a whole, that its power extends to all subjects of governmental regulation irrespective of whether the matter has been delegated to Congress or reserved to the States, in short, to use the phraseology of Mr. Justice Holmes in Missouri v. Holland, supra, what Congress cannot do unaided it can do when aided by a treaty. Reservation of certain powers to the States under our governmental system is in no way a limitation on the treaty-making power of the federal government. (99-100)

(99-100) The overwhelming majority of the modern writers on the subject has reached the conclusion that the powers reserved to the States are not a limitation on the treaty power of the United States; some reached that conclusion with enthusiasm, others with great reluctance. The following is a list, not an exhaustive one, of modern writers on both sides of the question. In favor of the preceding statement; Charles H. Burr: The Treaty-Making Power of the United States, Proceedings of the American Philosophical Society (1912), Vol. 51, pp. 327-374; Charles Henry Butler: The Treaty Making Power of the United States (1902); Edward S. Corwin: National Supremacy, Treaty Power vs. State Power (1913); Samuel C. Crandall: Treaties, Their Making and Enforcement (2d ed., 1916), pp. 246-265; Charles Cheney Hyde: International Law Chiefly as Interpreted and Applied by the United States (1922), Vol. 2, pp. 12-15; Frank B. Kellogg: Treaty-Making Power, Report of Annual Meeting of American Bar Association (1913), p. 331; Pittman B. Potter: Inhibitions upon the Treaty-Making Power of the United States, 28 Am. Journal of International Law, 456 (1934); Charles Pegler: Limitations of the Treaty-Making Power, 98 Centr. L. J. 41 (1925); Elihu Root: The Real Question under the Japanese Treaty, 1 American Journal of International Law, 273, 278 (1907); George Sutherland: Constitutional Power and World Affairs (1919);

This conclusion is strengthened by the conclusion reached in the preceding chapter. If the States have no power to enter into agreements with foreign nations regulating labor conditions, the federal government must have that power since it is not to be assumed that the people of the United States desired to withhold from their government the power to enter into treaties into which other civilized governments may enter.

(99-100) L. L. Thompson: State Sovereignty and the Treaty-Making Power, 11
(Cont'd) Cal. L. R. 242 (1923); W. W. Willoughby: The Constitutional Law of the United States (2d ed.), 1929, sec. 283;
Contra:
William E. Mikell: The Extent of the Treaty-Making Power, 57 U. of Pa. Law Rev. and Am. L. Reg. 435, 458 (1909); Shackelford Miller: The Treaty-Making Power, American Law Review, Vol. XLI, p. 527 (1907); Henry St. George Tucker: Limitations on the Treaty-Making Power (1915).
For bibliography on the subject see Library of Congress List of references on the treaty-making power compiled under the direction of Herman H. B. Meyer, Chief Bibliographer, 1920.

CHAPTER IV

HAS THE FEDERAL GOVERNMENT POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESSES THE REGULATION OF WHICH HAS BEEN DELEGATED TO CONGRESS?

Not only is the argument made that the United States Government has no power to enter into treaties regulating matters reserved to the States, but it is also argued that the federal government has no power to enter into treaties regulating matters delegated to Congress. Obviously, if both of these contentions were right, there would be nothing left concerning which a treaty might be validly entered into. It was shown in the preceding chapter that the decisions of the Supreme Court of the United States are uniformly to the effect that the federal government is not limited, when entering into treaties, by the reservation of certain matters to the States. Similarly, other decisions of the Supreme Court will show that the federal government may enter into treaties regulating matters delegated to Congress.

The earliest case on the subject is United States v. Schooner Peggy (101). An Act of Congress of 1798 authorized the President to issue commissions to owners of American armed vessels granting them the right to capture French armed vessels on the high seas. This was done in connection with the frequent attempts of French armed vessels to prey upon the commerce of the United States. In accordance with such commission the French armed vessel Peggy was seized and condemned by a judgment of a federal court on September 23, 1800. An appeal was taken from the judgment. On September 30, 1800, a convention was signed by the United States and France containing a provision, among others, that "property captured and not yet definitely condemned...shall be mutually restored." Chief Justice Marshall held that the Peggy had not been definitely condemned in view of the pendency of the appeal and that the vessel had to be returned to the French owner. Thus an Act of Congress, passed in the exercise of its power to regulate commerce or to declare war, or both, was superseded by a treaty regulating the same subject matter.

In Foster v. Neilson (102) the Court said:

> "A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

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(101) 1 Cranch 103, 2 L. Ed. 49 (1801)

(102) 2 Pet. 253, 7 L. Ed. 415 (1829)

> "In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision."

In Geofroy v. Riggs,(103) French heirs of a deceased citizen of the United States and resident of the District of Columbia brought an action to compel the sale of his real estate, claiming a share of the proceeds. In 1801 Congress, having exclusive power to legislate for the District of Columbia, continued the laws of Maryland in force in that part of the District which had been ceded by Maryland. Under that law a Frenchman could not inherit land from a citizen of the United States. In 1853 a treaty was entered into between the United States and France which was construed by the Court to have given Frenchmen a right to inherit land in the District of Columbia from citizens of the United States. The Supreme Court of the United States held that the treaty had superseded the law of the District of Columbia. This was clearly a case where a matter within the exclusive jurisdiction of Congress and on which Congress had acted, was held also to be within the scope of the exercise of the treaty making power of the Federal Government.

In Foli Young Yo v. United States,(104) a Chinese laborer claiming to be on his way from China to Mexico, stopped at San Francisco, stating that he was desirious of continuing his journey to Mexico by boat from San Francisco. He was detained by the United States Collector of Customs and ordered deported to China. A treaty between the United States and China entered into in 1894 provided:

> "That Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

In this case the Chinese laborer filed a petition for a writ of habaes corpus, but his petition was dismissed. The Supreme Court affirmed, saying in part:

> "We regard this (above-quoted provision of treaty) as explicitly recognizing existing regulations, and as assenting to their continuance, and to such modifications of them as might be found necessary to prevent abuse. It dealt with the subject specifically, and was operative without an Act of Congress to carry it into effect."

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(103) 133 U.S. 258, 33 L. Ed. 642 (1889)
(104) 185 U.S. 296, 46 L. Ed. 917 (1901)

The conclusion clearly is that the federal government has power to enter into treaties covering matters delegated to Congress by the Constitution and that such treaties, if self-executing, repeal previous Acts of Congress.

The converse of the foregoing proposition is also true. An Act of Congress repeals a previous treaty. Thus in the Cherokee Tobacco Case (105) Cherokee Indians claimed that a tax imposed by Congress on their manufacturing tobacco in the Cherokee country was void because it violated a treaty previously entered into between the United States and the Cherokee Nation. The Supreme Court of the United States held that there was a clear repugnancy between the Act of Congress and the Treaty and that the Act of Congress, being later in time, must prevail. In the case of Whitney v. Robertson (106) the Court said of an Act of Congress: "It was passed after the treaty with the Dominican Republic; and if there be any conflict between the stipulations of the treaty and the requirements of the law the latter must control." In the Head Money Cases (107) a claim was made that an Act of Congress of 1882 which imposed a 50¢ tax for each alien passenger arriving by boat in the United States conflicted with treaties previously entered into between the United States and several foreign countries, but the Supreme Court held that the judiciary had to follow the Act of Congress if it was later in time.

In the Chinese Exclusion Case (108) a Chinese laborer who had resided in the United States for two years left for China in 1887, with the intention of returning to this country. He held a certificate from the Collector of Customs at San Francisco permitting him to return. About a year later he came back to San Francisco but was prohibited from landing because a week before his arrival an Act of Congress had become effective annulling all permits granted by the Collectors of Customs, though such permits had been granted under authority of previous Acts of Congress. The claim was advanced that the Act annulling those permits was a violation of a treaty with China but the Supreme Court held that an Act of Congress and a treaty stand on an equal footing and the Act being later in time must prevail.

When we refer to the jurists and other writers on the subject we find Mr. Justice Sutherland (109) saying: "...the mere fact that Congress is authorized to legislate upon a particular subject does not, in my judgment, remove it from the jurisdiction of the treaty-making power, nor prevent treaty stipulations respecting it from becoming obligatory and effective without Congressional action." The same view has been

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(105) Two Hundred and Seven Half Pound Papers of Smoking Tobacco, etc. Elias C. Boudinot et al. claimants v. The United States, 11 Wall. 616, 20 L. Ed. 227 (1870)
(106) 124 U.S. 190, 31 L. Ed. 386 (1887)
(107) Edye v. Robertson, 112 U.S. 423, 28 L. Ed. 798 (1884)
(108) Chae Chan Ping v. The United States, 130 U.S. 581, 32 L.Ed. 1068 (1888)
(109) George Sutherland: Constitutional Power and World Affairs, 1919, p. 150

expressed by Charles H. Burr (110). A contrary view has expressed by William E. Mikell (111).

The practice of the government in entering into treaties shows that on innumerable occasions treaties have been entered into touching on matters expressly delegated to Congress by the Constitution. For instance: Article I, Section 8 gives Congress power to regulate commerce with foreign nations. Treaties of commerce are entered into regularly by the United States Government and have been entered into from the time of the formation of the United States, including the period during which the United States functioned under the Articles of Confederation.

The Congress is given power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to Their Respective Writings and Discoveries." International agreements regulating these very matters have been entered into by the United States for the last 50 or 60 years without anybody raising any question as to the propriety of the Government entering into such agreements.

Congress is given power "to provide and maintain a Navy: - to make Rules for the government and Regulation of the land and naval forces". In 1922 the United States Government entered into an international agreement limiting naval armament. (112)

The federal government undoubtedly has power to enter into treaties with foreign nations regulating labor conditions in businesses the regulation of which has been delegated to Congress.

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(110) Charles H. Burr: The Treaty Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States; Proceedings of the American Philosophical Society, Vol. 51, p.271, at pp. 306-327 (1912)

(111) The Extent of the Treaty-Making Power of the President and Senate of the United States, University of Pennsylvania Law Review and American Law Register, Vol. 57, p. 435, at p.456 (1909)

(112) See supra note 17.

CHAPTER V.

IS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT A LIMITATION ON THE POWER OF THE FEDERAL GOVERNMENT TO ENTER INTO TREATIES?

Anyone who studies American constitutional law must very soon come to the conclusion that the idea of wholly unlimited power is foreign to the American constitutional system. Judges of the Supreme Court and practically all writers on the subject have said on various occasions that the treaty-making power is not unlimited. James Madison wrote in 1791 that treaties were the supreme law of the land "provided however, that the treaty be within the prerogative of making treaties, which, no doubt, has certain limits". (113) In the case of Missouri v. Holland, 252 U.S. 415, 64 L.Ed. 641 (1919) Mr. Justice Holmes said: "We do not mean to imply that there are no qualifications to the treaty-making power." Charles Henry Butler (114) said:

> "...the fact that the United States is a Constitutional Government precludes the idea of any absolutely unlimited power existing. The Supreme Court has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited; and this rule applies to the exercise of the treaty-making power as it does to every other power vested in the Central Government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin."

Since no treaty has ever been declared invalid no one can say authoritatively that there is any specific valid limitation on the treaty-making power. There have been several pronouncements by the Supreme Court and considered statements by writers which I believe correctly state certain limitations, for instance: That the treaty power cannot be used to abolish the Constitution of the United States or to do away with the separation of powers as the basic feature of our governmental system. Apart from that it has been stated on many occasions that the federal government cannot do by a treaty what has been expressly forbidden by the Constitution. For instance, in Geofroy v. Riggs (115) the Supreme Court said: "It would not be contended that it (the treaty-making power of the federal government) extends so far as to authorize what the Constitution forbids..."

Mr. Justice Holmes in Missouri v. Holland impliedly took notice of that position by saying "the treaty in question (the Migratory Bird Treaty) does not contravene any prohibitory words to be found in the Constitution."

In Asakura v. City of Seattle (116) the court while invalidating a city ordinance because it violated a treaty, said:

> "The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids' it does extend to all proper subjects of negotiation between our government and other nations."

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(113) Writings of Madison, Vol. 1, p.524 as quoted in 13 Op.Atty.Gen. 357.
(114) The Treaty Making Power of the United States (1902), Vol.2, p.350, sec.455.
(115) 133 U.S. 258, 34 L.Ed. 642 (1889), supra note 5.
(116) 265 U.S. 332, 63 L.Ed. 1041 (1923)

Mr. Justice Sutherland said: (117)

> "Whatever the Constitution forbids absolutely, of course, may not be done by a treaty any more than by any other method ... It is clear that when the Constitution prohibits absolutely the doing of any particular act it is but an illustration of the prohibition to say that the act cannot be done under the power to make treaties;..."

The Constitution of the United States and the amendments thereto contain scores of express prohibitions. It cannot be said with assurance that every one of these prohibitions is a limitation on the treaty-making power. To give an authoritative answer one would have to investigate each prohibition to learn the reason for it, the evil that was intended to be remedied by the prohibition, construction by the courts and other matters. We are interested in one prohibition, contained in the Fifth Amendment - "No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;..."

The specific question before us is whether this due process clause is a limitation on the treaty-making power. The Fifth Amendment was adopted as a part of the so-called bill of rights embracing the first ten amendments. Though the federal Constitution was conceived as giving to the federal government only enumerated powers, many feared that the federal government might consider itself not bound to respect civil liberties and various personal rights which were guaranteed to the people by state constitutions. In order to allay those fears, the first Congress proposed twelve amendments of which ten were ratified and they are the first ten amendments to the Constitution.

There seems to be no record of any discussions in the federal convention with reference to the relationship between the treaty power and the personal liberties of the people of this country, but there are records of such discussions taking place in the state conventions called to ratify the federal Constitution. In the Virginia Convention (118) Patrick Henry spoke against ratification of the Constitution, on June 18, 1788. He reminded his audience of the case of a Russian ambassador to England who had been unlawfully arrested in England whereupon the Russian Emperor demanded of Queen Anne that the man who was guilty of the unlawful arrest be delivered to the Emperor of Russia for punishment. Queen Anne stated that under the constitution and laws of England that could not be done. Patrick Henry argued that since the treaty power was granted without any express limitations, in case an incident of that sort should occur in this country, the President and the Senate might enter into a treaty with the government of Russia to deliver the guilty person to Russia. He continued:

> "Suppose you be arrainged as offenders and violators of a treaty made by this government. Will you have that fair trial which offenders are entitled to in your own government? Will you plead a right to the trial by jury?"

James Madison replied: (119)

> "As to the case of the Russian ambassador, I shall say nothing. It

(117) George Sutherland: Constitutional Power and World Affairs (1919) pp. 143, 146.
(118) Elliott's Debates on the Federal Constitution, vol. 3, p. 503.
(119) Elliott, Op. Cit., vol. 3, p. 514

is as inapplicable as many other quotations made by the gentleman. I conceive that, as far as the bills of rights in the states do not express any thing foreign to the nature of such things, and express fundamental principles essential to liberty, and those privileges which are declared necessary to all free people, these rights are not encroached on by this government."

Thus, according to Madison, even prior to the adoption of the Fifth Amendment the personal rights of the American people were safeguarded against the exercise of the treaty power of the federal government.

In the North Carolina Convention Mr. Henry Abbott said on July 30, 1788 (120)

"It is feared by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States, which would prevent the people from worshipping God according to their own consciences. The worthy member from Halifax has in some measure satisfied my mind on this subject. But others may be dissatisfied."

It seems clear that when the participants in the state conventions ratified the federal constitution they did so either because of a conviction or because of a belief, more or less certain, that the treaty-making power was not potent enough to encroach on their personal liberties.

No one can claim that the constitutional amendments adopted a few years later weakened the status of those personal liberties. On the contrary those amendments clearly strengthened the personal liberties of the people.

Charles Henry Butler (121) said:

"In fact the (treaty making) power is, and must be, plenary, that word being used in its general significance, except so far as it has been limited by the rule laid down by the Supreme Court that where plenary powers have been reposed in the Government of the Unites States they must be exercised in conformity with the fundamental principles of liberty which form the basis of our constitutional government."

Edwin S. Corwin (122) expresses the view that the "distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights," the former class including a right to due process of law "may be confidently claimed as establishing the limits, not merely of congressional power, but of the treaty power as well, whenever it impinges upon private rights."

Willoughby states (123) : "Though comprehensive in scope, the treaty-making power of the Federal Government must, in its exercise, as concerns the substance of the agreements entered into, have regard for the various constitutional limitations, necessarily implied as well as those expressed, which

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(120) Elliott, Op. Cit., vol. 4, p. 191
(121) The Treaty Power of the United States, vol. 2, p. 352 (1902)
(122) National Supremacy, Treaty Power v. State Power, (1913) pp. 15-17.
(123) W.W.Willoughby: The Constitutional Law of the U.S., second ed., (1929) vol. 1, p. 519.

restrain generally the exercise of Federal powers. Indeed, the Supreme Court has several times said in so many words, that the authority given to the United States to enter into treaties, does not extend "so far as to authorize what the Constitution forbids."

Forrest R. Black reached the following conclusion: (123a)

> "A treaty must not interfere with the rights guaranteed to individuals (on the continental mainland of the United States) by the Constitution. The Bill of Rights generally would constitute a limitation and would protect individuals within the United States."

Those who favor the state-rights doctrine, that is, that the treaty power is subordinate to the powers reserved to the States, being inclined to limit federal power, of course believe that the treaty-making power is limited by the due process clause. Thus Henry St. George Tucker (124) states as his conclusion: "That a treaty cannot take away or impair the fundamental rights and liberties of the people secured to them in the Constitution itself, or in any Amendment thereof." William E. Mikell assumes that the amendments to the Constitution which contain the so-called bill of rights are limitations on the treaty-making power. (125)

On the other hand Pittman B. Potter (126) believes that to determine what limitations there are on the treaty power of the United States it is necessary to look to international law as well as to the Constitution of the United States, that according to international law the power of a state to enter into treaties is unlimited, that the United States Constitution does not expressly impose any limitations on the treaty-making power and therefore none should be recognized. It is submitted that the Supreme Court will not take that view.

Though the decisions of the Supreme Court do not contain discussions as to the relationship between the due process clause and the treaty-making power, there are certain other discussions in the decisions which can be used by way of analogy. The treaty-making power, including in its scope matters reserved to the States as well as those delegated to Congress, in that regard resembles very strongly the powers of Congress with reference to territories. Therefore, views of the Supreme Court expressed in connection with legislation for territories may shed light on the treaty power.

In the case of Downes v. Bidwell (127) an action was brought against the Collector of the Port of New York to recover back duties paid under protest upon oranges consigned from Puerto Rico to the plaintiffs at New York City in November 1900, after the passage of the so-called Foraker Act which provided a civil government and a system of revenues for Puerto Rico. The Foraker Act imposed the duties but the plaintiffs claimed that, Puerto Rico being a part of the United States after cession by Spain and having a government organized by the United States Congress, the duties imposed were unconstitutional because

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(123a) The U.S. Treaty Power and Limited Government, 11 St. Louis Law Rev. 6, (1929) at p. 17

(124) Limitations on the Treaty-Making Power (1915) pp. 430 et seq.

(125) William E. Mikell: The Extent of the Treaty-Making Power of the President and Senate of the U.S., Univ. of Pa. Law Review and American Law Register, Vol. 57, pp. 435, 528, at p. 531 (1909)

(126) Inhibitions upon the Treaty-Making Power of the U.S., 28 Am. Journal of International Law, 456 (1934) at p. 473.

(127) 182 U.S. 244, 45 L. Ed. 1088 (1900)

they violated the provision of Article I, Section 8 of the Constitution that "all duties, imposts, and excise shall be uniform throughout the United States" The Supreme Court held (5 to 4) that the duties were validly imposed, that Puerto Rico was not a part of the United States within the meaning of that clause of the Constitution and that the Constitution did not of its own force extend to Puerto Rico, in the absence of Congressional legislation expressly extending the Constitution to that land. In one of the prevailing opinions Brown, J., said at p. 277:

> "To sustain the judgment in the case under consideration (dismissing the complaint on demurrer), it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus, when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed' and that 'no title of nobility shall be granted by the United States', it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the first amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble and to petition the government for a redress of grivances". We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

In another prevailing opinion, that of Mr. Justice White with whom Shiras and McKenna, JJ. concurred, the following was said (pp. 294, 295):

> "Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."

The dissenting judges not only agreed with those views but carried them to the extreme conclusion holding that the constitutional provision prescribing uniform taxation also applied to Puerto Rico.

In Territory of Hawaii v. Mankichi (128) a Japanese subject was convicted in Hawaii of manslaughter in accordance with the usual procedure in the Republic of Hawaii prior to its incorporation as a Territory. He obtained his discharge by a judgment of a federal court which invalidated the conviction on the grounds that his indictment had not been found by a grand jury and that he had not been convicted by an unanimous verdict of the jury, as required by the United States Constitution. The procedure followed in his trial was the

(128) 190 U.S. 197, 47 L. Ed. 1016 (1903)

established procedure of Hawaii prior to June 1900 when the United States Constitution was extended to the islands by a Congressional Act, and Hawaii was formally incorporated as a Territory. His trial took place before June 1900. By a 5:4 decision the Supreme Court reversed the lower federal court and held that prior to the extension of the Constitution to Hawaii the constitutional requirements as to grand and petit juries did not apply and that Mankichi was therefore duly convicted.

In Dorr v. United States (129) Dorr and O'Brien, editors of a newspaper published in Manila, Philippine Islands, were convicted of libel on the basis of headlines printed in the newspaper. They demanded a jury trial in the court of the City of Manila, Philippine Islands, but were convicted by a court without a jury which was at that time the regular procedure in the Philippine Islands. The Supreme Court affirmed on the ground that the Constitution of the United States had not been extended to the Philippine Islands. The court said:

> "Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (Downes v. Bidwell, 118 U.S. 244) that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation..."

The court then quotes with approval language of Mr. Justice Brown in the case of Downes v. Bidwell, supra, as follows:

> "We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (right to trial by jury and presentment by grand jury) are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

The above cases show that even where the Constitution is not binding, for instance in a territory to which Congress has not yet extended the Constitution, Congressional legislation may not violate the bill of rights, according to the view expressed by the Supreme Court.

The exceptions made, in that the Court recognized the validity of local legal procedure which did not comply with the requirements of the Constitution for grand juries or petit juries, were justified by the Court as referring to rights "not fundamental in their nature" and concerning "merely a method of procedure."

If that is the way the Supreme Court feels about the bill of rights being a limitation on federal law where the Constitution does not apply, the probability is very great that the Court will consider the bill of rights to be a limitation on federal treaties which operate on citizens of the United States and are entered into under the Constitution of the United States.

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(129) 195 U.S. 138, 49 L. Ed. 128 (1903)

The next question to be considered is this: If the due process clause is a limitation on the treaty-making power, what is the effect of that limitation on treaties which may attempt to regulate labor conditions?

A. Minimum wages.

The case of Adkins v. Children's Hospital, (130)-(131) held that fixing of minimum wages violates the due process clause of the fifth Amendment. In 1918 Congress passed the District of Columbia Minimum Wage Act. Pursuant to statute a Board was organized to establish "standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain themselves in good health and to protect their morals."

The Children's Hospital which employed many women brought an action to enjoin the Board from enforcing orders fixing minimum wages. The Supreme Court of the United States agreed with the courts of the District of Columbia in holding the statute invalid on the ground that it limited the freedom of contract of employer and employee. This decision (5 to 3, Brandeis, J. not voting) is still law and would probably prevent the Government of the United States from entering into treaties fixing minimum wages. Whenever the government enters into a treaty it impliedly represents that it has constitutional power to do so. In view of the Adkins case the Government cannot make any such representation in good faith where the proposed treaty is to deal with fixing minimum wages.

B. Maximum Hours of labor.

Bunting v. Oregon (132) upheld a statute of Oregon passed in 1913 which provided "no person shall be employed in any mill, factory, or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees who are engaged in any necessary repairs, or in cases of emergency, where life or property is in imminent danger;..." Bunting had employed a worker in a flour mill in Oregon for 13 hours in one day in violation of the statute and was convicted. The Supreme Court affirmed and held that the statute did not violate the due process clause of the 14th Amendment, that it was a proper exercise of the police power of the state. Though a contention was made that the law was not either necessary or useful "for preservation of the health of employees in mills, factories and manufacturing establishments" the court accepted the statement of the legislature of Oregon and the Supreme Court of that State to the effect that the statute was necessary and useful for the preservation of the health of the workers affected. The case was decided by a majority of 5 to 3, Brandeis, J. not voting. In view of that case the federal government is justified in entering into treaties limiting the hours of labor of employees "in any mill, factory and manufacturing establishment". The case did not hold that limitation of hours of labor of all employees is good under the due process clause. But there is no logical reason for distinguishing between an employee in a factory and in a commercial establishment.

It is submitted, therefore, that the federal government would be justified in entering into a treaty limiting hours of labor.

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(130)-(131) 261 U. S. 525, 67 L. Ed. 785 (1923)
(132) 243 U. S. 426, 61 L. Ed. 830 (1917)

C. Prohibition of child labor.

The Supreme Court has held in the case of Sturges & Burns Mfg. Co. v. Beauchamp (133) that a state statute which prohibited child labor in hazardous occupations did not violate the due process clause of the 14th Amendment. In that case a minor under the age of 16 years was employed to operate a punch press used in stamping sheet metal in a tinware factory. The statute of Illinois of 1903 prohibited the employment of children under the age of 16 years in various hazardous occupations including that in which this minor was engaged. He was injured while working on the job and brought an action for damages. The trial court instructed the jury that if the plaintiff was in fact less than 16 years old and when injured was employed by the defendant upon a stamping machine, the defendant was guilty of a violation of the statute and the plaintiff was entitled to recover. Hughes, J., for an unanimous court, affirmed judgment for the plaintiff and said in part:

> "The Federal question presented is whether the statute, as construed by the state court, contravenes the 14th Amendment. It cannot be doubted that the state was entitled to prohibit the employment of persons of tender years in dangerous occupations, (citations) ... where, as here, such legislation has reasonable relation to a purpose which the state was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law."

Would the Supreme Court uphold a statute, or a treaty, prohibiting child labor in all occupations? The Supreme Court has not held on that point one way or another. The state courts in general favor that type of legislation. A decision by the highest court of Arkansas (134) expressly uphold a statute prohibiting all labor by children under a certain age.

Since the attack under the due process clause directed against regulation of labor conditions is based on the alleged desire to preserve liberty of contract, prohibition of child labor would be upheld because infants have no capacity to enter into absolutely binding contracts and adults who deal with infants are presumed to be familiar with their legal status. There is no liberty of contract to be preserved. It is submitted, that treaties prohibiting child labor may be entered into.

As far as is known no one has ever claimed that the Supreme Court of the United States has no power to declare a treaty unconstitutional, except, perhaps, by implication, Pittman B. Potter (page 45) of this paper. Statements have been made that the power of the court to declare a treaty unconstitutional is doubtful. In the early case of Ware v. Hylton (135) Judge Chase said:

> "If the court posses a power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

Justice Holmes said in Missouri v. Holland: (136)

> "Acts of Congress are the supreme law of the land only when made in

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(133) 231 U.S. 320, 58 L. Ed. 245 (1913)
(134) Terry Dairy Co. v. Malley, Ark. 225 S.W. 887 (1920)
(135) 3 Dall. 243, 1 L. Ed. 568 (1796)
(136) 252 U.S. 416, 64 L. Ed. 641 (1920)

pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the Convention."

In spite of all those expressed doubts, there is no escape from the conclusion that the Supreme Court of the United States has power to declare treaties unconstitutional. If the treaty-making power were absolutely unlimited, obviously nobody would have the power to declare a treaty invalid after that treaty has been entered into by the President by and with the advice and consent of the Senate with the concurrence of two-thirds of the Senators present. But since practically everybody admits that the treaty power is not unlimited, if the treaty-making power should transcend its limitations and a citizen should find himself compelled to do or to refrain from doing something because of a treaty and should apply to a court for relief, the court would have to declare that the citizen had been lawfully or unlawfully compelled to act or restrained from acting. Thus the door would be wide open to the courts declaring a treaty valid or invalid under the Constitution of the United States. To take a crass example: If the President by and with the advice and consent of the Senate, two-thirds of the members present concurring therein, should enter into a treaty with a foreign power or a number of foreign powers, transferring the legislative power of the United States Government to the Executive or transferring the executive powers to Congress or agreeing to install a person as a ruler of the United States for life or for a definite number of years, and subsequently such a treaty should be drawn into controversy by a citizen in a court proceeding and such proceeding should find its way to the Supreme Court of the United States, no one would maintain that the Supreme Court would be bound to adjudge the rights of the citizen in accordance with that treaty. The Supreme Court would properly declare such a treaty void, as against the citizen involved. If that is admitted one must also admit the power of the Court to declare a treaty invalid if the treaty fixes, let us say, minimum wages and the Court declares that fixing minimum wages by a treaty amounts to taking people's liberty or property without due process of law. By declaring a treaty invalid the Court would, in effect, compel the government of the United States to breach its contract which may necessitate payment of damages to the nation injured; but that does not affect the question as to whether or not a citizen of the United States is bound by a treaty which has been entered into in excess of constitutional limitations. When Congress breaches a treaty by passing an Act in conflict therewith (see pp. 39-40) the Supreme Court recognizes the Act of Congress as binding and not the treaty. It is not believed that the Court would shrink from declaring a treaty unconstitutional because such conduct would put the United States Government in the position of breaching a contract. Naturally, the conviction of the Court that the treaty does transcend constitutional limitations would have to be very strong, but on principle it does not seem that the Court would not claim, and if it feels the need to do so, exercise the power to declare a treaty unconstitutional.

The answer to the question put at the head of this chapter is that the treaty-making power is limited by the due process clause of the fifth amendment.

CHAPTER VI.

DOES A TREATY THAT REGULATES LABOR CONDITIONS REQUIRE LEGISLATION TO BECOME EFFECTIVE?

Some treaties become effective without any legislation, others only when followed by legislation. In the early case of Foster v. Neilson (137) Chief Justice Marshall laid down the distinction between those two kinds of treaties:

> "A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
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> "In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract - when either of the parties engages to perform a particular act - the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court."

The distinction relied upon by Chief Justice Marshall is whether "the terms of the stipulation import a contract" - which makes it necessary for the Legislature to "execute the contract before it can become a rule for the court." In other words, it depends on the intent of the parties to the treaty.

The court has also said in Whitney v. Robertson (138):

> "When the stipulations (of the treaty) are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment."

The Supreme Court has held several treaties to be self-executing. In United States v. 43 Gallons of Whiskey (139) the treaty involved was one between the United States and an Indian tribe by which the tribe ceded land to the United States with a proviso that federal liquor laws - those then in existence as well as those that might be enacted in the future - should continue in full force and effect throughout the ceded country until other-

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(137) 2 Pet. 253, 7 L. Ed. 415 (1829)
(138) 124 U.S. 190, 31 L. Ed. 388 (1887)
(139) 93 U.S. 188, 23 L. Ed. 846 (1876)

wise directed by Congress or the President of the United States. That treaty was not followed by an act of Congress but in spite of that the Supreme Court held it to be self-executing and enforced the treaty.

In DeLima v. Bidwell (140) DeLima & Company doing business in New York City imported sugar from Puerto Rico during the autumn of 1899. That was after the ratification of the treaty of cession of Puerto Rico to the United States but before the passage of an Act of Congress providing for revenue and a civil government for the island. The court held "that by the ratification of the treaty of Paris the Island became territory of the United States" and therefore the duty was wrongfully collected since the sugar was not 'imported'".

In Fok Young Yo v. The United States (141) already referred to on page 39 of this paper, the treaty between the United States and China which permitted Chinese subjects to continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, was held to be operative without an Act of Congress to carry it into effect.

In Asakura v. City of Seattle (142) already referred to on page 62 of this paper, a treaty between the United States and Japan which secured to citizens of either country the right to engage in business in the other was held to be self-executing. The court said:

> "It (the treaty) operates of itself without the aid of any legislation, state or national, and it will be applied and given authoritative effect by the Court."

Similarly the treaty of Berlin which terminated the war between the United States and Germany extended the time for filing applications for patents for a period of six months after the treaty was to take effect, that is, six months after November 11, 1921. An application filed on May 10, 1922 which was exactly one day before the end of the six months period was held to have been filed in time because the treaty provision governing this matter was held to be self-executing and not to require an Act of Congress to give it effect. (143) Mr. Justice Field in his dissenting opinion in Baldwin v. Franks (144) enumerates treaties which were held to be self-executing, especially those that "declare the rights and privileges which citizens or subjects of each nation may enjoy in the country of the other" and also those "stipulating that the subjects or citizens of those nations may trade with the United States and for that purpose freely enter into our ports with their ships and cargoes, and reside and do business here."

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(140) 182 U.S. 1, 45 L. Ed. 1041 (1901)
(141) 185 U.S. 296, 46 L. Ed. 917 (1901)
(142) 265 U.S. 3320, 68 L. Ed. 1041 (1923)
(143) General Elec. Co. v. Robertson 21 Fed. (2d) 214, Dist.Ct.D.Md.(1927)
(144) 120 U.S. 678, 30 L. Ed. 766 (1886) at pp. 703, 704.

On the other hand some treaties have been held to require legislation to become effective.

In Foster v. Neilson, supra (145) Chief Justice Marshall held that a treaty between Spain and the United States which declared that certain grants of ceded territory "shall be valid to the same extent as if the ceded territory had remained under his (the Spanish King's) dominion," was not self-executing because the language imported a promise to do something in the future. With reference to the language ratifying and confirming the grants, Chief Justice Marshall asked:

> "By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of legislation."

In Baldwin v. Franks (146) a treaty between the United States and China giving the Chinese subjects a right to reside in the United States and also granting them all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation was held to require further legislation and an Act of Congress which purported to put the treaty into effect was held not to have been clear enough to accomplish the purpose. There was a strong dissenting opinion by Mr. Justice Field who held that the treaty was self-executing.

With these cases in the background, it will be seen readily that a treaty which attempts to regulate labor conditions must leave very many things for arrangement and detailed regulation by the legislative bodies of the contracting powers. In each country there are situations that call for exceptional treatment, there are sectional and regional differences which must be taken into consideration by the legislative authorities of each country. A treaty can do no more than provide the frame-work and leave the erection of a complete structure to the legislative authorities of the countries involved. The conventions drafted by the International Labor Organization, without exception, refer to the legislative authorities of the signatory countries as the bodies charged with the enactment of detailed legislation to give effect to the conventions and so it must be because of the nature of the regulations involved. Hence, treaties dealing with labor conditions, would normally not be self-executing but would become effective only after appropriate legislation by Congress.

Such legislation would have to meet the standards of proper delegation of power and due process, like any other legislation. A recent example of an inquiry into these matters is presented in the case of Shouse et al. v.

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(145) Note 137.
(146) 120 U.S. 678, 30 L. Ed. 766 (1886)

Moore, U.S. Marshal et al. (147) In that case the statute which gave effect to the migratory bird treaty already upheld by the Supreme Court in Missouri v. Holland, was attacked on the ground that it failed to set up proper standards of delegation of power and that it violated the due process clause of the fifth amendment. Both contentions were rejected and the statute was upheld by the court.

The necessity of having legislation enacted to put into effect a treaty dealing with labor conditions will allay the fears of some people that the treaty power might be used to force something on the country without giving the House of Representatives, which is supposed closely to express the popular will, an opportunity to pass on the matters regulated by the treaty.

In view of the subject matter of treaties regulating labor conditions and in view of all the conventions drafted by the International Labor Organization which without exception provide for detailed regulation by the legislatures of the member states, it can be stated without hesitation that no labor treaty can reasonably be expected to be entered into by the United States which will be self-executing. No labor treaty can reasonably be expected to be so drafted that it will operate on a citizen without legislation by Congress.

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(147) Dist. Ct. E. Dist. Ky., No. 244, Aug. 31, 1935, Ford J., reported in U.S. Law Week of October 1, 1935, pp. 5-6.

CHAPTER VII

RATIFICATION BY THE UNITED STATES OF CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOR CONFERENCE

A. Obligations of the United States with Reference to Draft Conventions.

The International Labor Conference is a body composed of delegates of the states which are members of the International Labor Organization. The conference meets once a year and adopts various recommendations and draft conventions dealing with labor conditions. There is no obligation on any member to ratify any draft convention or to embody the principles laid down in a recommendation in legislation, but a member is not entirely without any obligation with reference to such recommendations and draft conventions. The obligations of the members are laid down in Article 405 of the Constitution of the International Labor Organization, the constitution being Part XIII of the Treaty of Versailles. The pertinent part of Article 405 reads as follows: (148)

(1) "When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or (b) of a draft international convention for ratification by the Members...

(5) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

(6) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

(7) In the case of a draft convention, the Member will if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

(8) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

(9) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case..."

(148) International Labor Organization, Treaty Series, No. 874, pages 13-14. I have numbered the paragraphs of Article 405 for the sake of convenience.

To understand the meaning of these provisions it is necessary to look into their history. As a part of the machinery that paved the way for the work of the Peace Conference in Paris in 1919, a commission was created, to which each of the allied and associated powers sent two official representatives, for the purpose of devising ways to improve the conditions of labor. President Wilson appointed Samuel Gompers and Henry M. Robinson representatives of the United States on that commission. The commission elected Samuel Gompers chairman. The British delegation presented a detailed draft outlining the organization and functions of a proposed international labor organization. That draft was the basis of discussion. The commission met for the first time on February 1, 1919. (149) A draft completed by the British delegation on January 26, 1919, and not submitted to the commission, provided in Article 6 thereof that a Conference composed of delegates of the members of the International Labor Organization should adopt, from time to time, draft international conventions and further provided (150) that

> "Each of the High Contracting Parties undertakes that it will within the period of one year from the end of each meeting of the Conference make for the House of its national parliament or other legislative authority an opportunity to consider the conventions adopted by the Conference and if its national parliament or other legislative authority pronounces in favor of the Convention it shall communicate its formal ratification of the Convention to the Director and shall forthwith take all steps necessary to put the Convention into operation."

That language was changed and in an amended draft, completed February 2, 1919, and submitted to the commission, it read: (151)

> "18...Each of the High Contracting Parties undertakes that it will within the period of one year from the end of the meeting of the Conference communicate its formal ratification of the Convention to the Director, and will forthwith take all steps necessary to put the Convention into operation, unless such Convention is disapproved by its legislature."

This language contemplates that after the Conference adopts a convention, every member of the International Labor Organization is bound (a) formally to ratify the convention, (b) to communicate the ratification to the Director, and (c) to take all steps necessary to put the convention into operation. The only way in which those three obligations may be nullified is by the legislature of the member disapproving the convention. The members of the Commission in the course of the discussion of this provision correctly described the power of the legislature as a "veto power".

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(149) Shotwell: The Origins of the International Labor Organization, Vol. II, p. 149
(150) Shotwell: Op.cit. Vol. I, pages 392-394
(151) Shotwell: Op.cit. Vol. I,,pp. 392,4.

That expression was used by Gompers, (152) by Vandervelde of the Belgian delegation, (153) Barnes of the British delegation, (154) and by Baron Mayor des Planches of the Italian delegation. (155)

The Italian delegation brought in a resolution (156) to the effect that conventions adopted by the Conference should have statutory effect after the lapse of one year subject to a right of appeal to the League of Nations but the resolution was not adopted.

In the course of the discussion Robinson pointed out (157) that the President of the United States "could not engage his country without previous reference to the Senate", that the right of legislation "could not be delegated to the executive power, even with the reservation of a right of veto to Congress". Gompers pointed out that "the 48 states retained all the rights that were not expressly conferred on the federal power...What use therefore would it be to agree to the text proposed if the Senate, or, failing that, the Supreme Court subsequently declared it to be unconstitutional?".

The American delegates were willing to accept the proposed language with the addition of the following paragraph:

> "And, except where this undertaking is inconsistent with the constitution or organic law of any of the High Contracting Parties, and in such case, it shall be obligatory on such High Contracting Party to use its utmost efforts to bring about such legislation as shall give full effect to any Convention so approved."

The difficulties raised by the American delegates were summed up by Delevingo of the British delegation as follows: (158)

> "1. The reservation 'unless such Convention is disapproved by its Legislature' imposed too strict an obligation on the Federal Executive.
> 2. In the United States labour legislation is a matter for the individual States, and not for the Federal Legislature.
> 3. Any law passed by a State Legislature or by Congress may be declared unconstitutional by the Supreme Court."

In order to meet the objections of the American delegates Barnes of the British delegation proposed an amendment on February 27, 1919 (159) to eliminate the words "unless such convention is disapproved by its Legislature" and instead to insert the words "unless the Convention fails to obtain the consent of the National Authorities concerned" and to add the

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(152) Shotwell: Op.cit. Vol. II, p. 158.
(153) Shotwell: Op.cit. Vol. II, p. 161.
(154) Shotwell: Op.cit. Vol. II, p. 176.
(155) Shotwell: Op.cit..Vol. II, p. 180.
(156) Shotwell: Op.cit: Vol. II, p. 175.
(157) Shotwell: Op.cit. Vol. II, pp. 184,185.
(158) Shotwell: Op.cit. Vol. II, p. 186.
(159) Shotwell: Op.cit. Vol. II, p. 204.

following paragraph:

> "In the case of a Federal State, if the power of the legislation on any matter dealt with in any Convention rests with the Legislatures of the Constituent States, the High Contracting Party shall communicate the Convention to the Constituent States and each State may adhere separately to the Convention. Notification of the adhesion of any such State through the Federal Government to the Director shall be deemed to be the ratification of the Convention in respect of that State."

Robinson was not satisfied with that amendment. He stated the difficulty as follows: (160)

> "If a convention could not be given effect to in the case of the United States owing to the fact that its signature by the Federal Government did not commit the Constituent States to pass the necessary legislation, the country might find itself in the impossible situation of being held responsible for failing to carry out the Convention, although it was not its fault that the Convention had not been carried out."

On February 28, 1919 Robinson stated the objections of the American delegation to the provision of Article 18 discussed herein, as follows: (161)

> "(1) The Senate has the constitutional power and duty to advise and consent to treaties. To allow a foreign body to make a treaty to bind the United States would be, in effect, a delegation of the treaty-making power to the extent of the provisions of the treaty.
> (2) The Congress of the United States is the Legislative Body of the United States in such matters as have been delegated to it by the States of the Union. And, it is generally understood that the Police Power, as such, is not among the powers granted to the Union, but among those reserved to the States. Legislation required to give effect to a treaty would need to be passed by the Congress as a whole, and it is for the Congress to determine, notwithstanding the terms of the treaty, whether it will or will not pass such legislation. Furthermore, the Congress of the United States cannot be bound in advance to pass such legislation, either affirmatively or negatively.
> (3) In regard to the reserved powers, including therein the so-called Police Powers, the States retain the right of legislating for their citizens. Neither the executive nor the legislative branch of the Federal Government can give any assurance that any legislative action will be taken in any of the States.
> (4) In ultimate resort the constitutionality of a treaty or of an act of Congress may be tested in the Supreme Court of the United States. The legislation passed by a State Legislature may be tested in the State Courts and in the Supreme Court of the United States. The legislation of Congress may be declared unconstitutional by the federal judiciary, and that of

(160) Shotwell: Op.cit. Vol. II, p. 205
(161) Shotwell: Op.cit. Vol. II, p. 210.

the States by the State judiciary or the federal judiciary."

On February 28, 1919 Delevingne of the British delgation again summarized the difficulties raised as regards the United States and proceeded to explain how the British draft as amended met the objections: (162)

> "(a) The possibility that a law might be declared unconstitutional by the Supreme Court.
> (b) The possibility that the State Legislatures would not pass the measures required to fulfill the obligations assumed under an International Convention.
> (c) Assuming that labour legislation belonged exclusively to the separate States, the possibility that a law passed by any Legislature might be modified by its successor.
> The first point did not constitute a serious difficulty.
> In order to meet the second point, the British Delegation proposed to provide in general terms at the end of the fourth paragraph that the consent required should be that of the 'national authorities'. If this wording was not suitable, 'the consent of the competent authorities' could be substituted.
> Finally, to meet the third difficulty, the British Delegation put forward a text which expressly maintained the rights of the separate States, and so far as he could see no valid criticism had been brought against this text. On the other hand, the text proposed by Mr. Robinson had the disadvantage that it imposed on the United States an obligation infinitely less rigorous than that placed upon the other States..."

The British provision as amended was then adopted, (February 28, 1919) only Gompers and Robinson voting against it. The entire draft was adopted on "second reading" on March 10, 1919. The provision in question became Article 19 and read: (163)

> "Each of the High Contracting Parties undertakes that it will within the period of one year at most from the end of the meeting of the Conference communicate its formal ratification of the convention to the Director, and will forthwith take all steps necessary to put the convention into operation, unless such convention fails to obtain the consent of the competent authorities.
> In the case of a Federal State, if the power of legislation on any matters dealt with in a convention rests with the legislatures of the constituent States, the High Contracting Party shall communicate the convention to the constituent States, and each such State may adhere separately to the convention. Notification of the adhesion of any such State through the Federal Government to the Director shall be deemed to be the ratification of the convention in respect of that State."

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(162) Shotwell: Op.cit. Vol. II, p. 213.
(163) Shotwell: Op.cit. Vol. I, pp. 393, 395.

Robinson acted throughout the discussions on advice of American constitutional lawyers. He was certainly right in asserting that the United States could not bind itself in advance to consider conventions adopted by the International Labor Conference as binding on the United States. He was probably also right in asserting that the Supreme Court had the power under certain circumstances to declare unconstitutional, legislation passed in pursuance of a treaty. But he was wrong in asserting that the treaty-making power of the United States did not extend to the regulation of labor conditions on the ground that labor conditions were within the police power of the States. (164)

Some of the British delegates were not sure that the American delegates correctly stated the constitutional law of the United States. Phelan of the British delegation contacted Felix Frankfurter and a number of other lawyers who were then in Paris and "they were unanimously of the opinion that the constitutional difficulties could be overcome", (165) but they were not overcome by the Commission adopting the British draft with Gompers and Robinson voting against it.

By way of framing a proposal acceptable to the United States and also to other states James T. Shotwell, for the American delegation, drafted the following three articles (166) for submission to the Commission:

Article 19

> "When the Conference had decided on the adoption of proposals with reference to an item on legislation for labor in the Agenda, these proposals shall be embodied in the form of a recommendation for suitable legislation, or other suitable action.
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> Such recommendation shall forthwith be laid before the Conference for consideration and decision. If on the final vote the recommendation receives the support of two-thirds of the votes cast by the delegates present, it shall be held to be adopted by the Conference, and a copy of the recommendation, authenticated by the signatures of the President of the Conference and of the Director, shall be deposited with the Secretary-General of the League of Nations. The Secretary-General shall then communicate a certified copy of the recommendation to each Power represented at the Conference for

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(164) See Chapter III of this paper. That the American delegates incorrectly represented the constitutional law of the U. S. at the meetings of the Commission is also the conclusion of Francis G. Wilson, in International Labor Relations of Federal Governments, 10 Southwesterly Political and Social Science Quarterly (1929) p. 193. Even before Missouri v. Holland, numerous decisions showed to an impartial mind that the treaty power was not limited by the powers reserved to the states. The case of Missouri v. Holland (argued March 2, 1920, decided April 19, 1920) definitely announced that doctrine.

(165) Shotwell: Op.cit. Vol. I, p. 155.

(166) Shotwell: Op. cit. Vol. II, pp. 262-3.

appropriate legislation or other action necessary to make effective the provisions of such recommendation. Thereupon each of the High Contracting Parties will, within the period of one year at most from the end of the meeting of the Conference, bring the recommendation before the national authority or authorities within whose competence the matter lies, for the enactment of such legislation or other action. If, in the case of any High Contracting Party, no legislation or other action necessary to make such recommendation effective is taken, the submission of the recommendation for such action shall end the obligation of such High Contracting Party."

Article 20

"The Conference may at any time by two-thirds vote of its members cause any proposal it had adopted and recommended to be embodied in a draft Convention. The Conference, after consideration of any such draft Convention, may by a two-thirds vote of the members of the Conference approve the same, and any draft Convention so approved by the Conference shall be authenticated, deposited, and communicated by the Secretary-General of the League of Nations as provided in Article XIX to the High Contracting Parties as a draft Convention approved by the General Conference. If any one or more of the High Contracting Parties shall sign and ratify a Convention which has been communicated as a draft Convention approved by the Conference, the same shall be deposited with the Secretary-General of the League of Nations, and any subsequent adherence thereto of any one or more of the other High Contracting Parties shall likewise be so deposited."

Article 21

"Each High Contracting Party in due course will report to the Secretary-General of the League of Nations any action taken upon a recommendation of the General Conference communicated to it."

The Commission created a sub-committee to consider the American proposals. The sub-committee consisted of three members of whom Robinson was one. On March 19, 1919 Delevingne as chairman of the sub-committee reported to the Commission as follows: (167)

"I am desired by the Sub-Committee to report to the Commission the result of their labours. The Commission will remember that the United States Delegation on Monday brought up important proposals, the effect of which in brief was -

1. That the Labour Conference should have a discretion to submit any proposals that it might adopt in the form of a 'recommendation' to the States which are parties to the Labour

(167) Shotwell: Op.cit. Vol. II, pp. 361-363.

Organization instead of in the form of a draft Convention; that the States should be under obligation to submit such a recommendation to the competent authorities for legislation or other action to give effect to it; and that the action taken should be reported to the Secretary-General of the League. Having fulfilled this obligation, the State would not be subject to any further obligation, and in particular, the provision as to sanctions would not apply.

2. That in the case of a draft Convention being adopted by the Labour Conference, no obligation was to be placed on any State to submit the Convention to its competent authorities - or to ratify the Convention in the event of its being approved by the competent authorities - but if a State did decide to ratify a Convention, the ratification was to be deposited with the Secretary-General of the League...

These proposals were not acceptable to the Commission, and the Sub-Committee were appointed to find, if possible, some compromise which would meet the difficulties of the United States and some other States and make it possible for them to become parties to the Convention, while preserving the substance of the scheme as already adopted by the Commission.

The Sub-Committee after long consultations have agreed to submit the new Articles XIX and XX which are before the Commission. If these articles are accepted by the Commission, all the American proposals to which I have referred are withdrawn. The new articles would make two modifications of importance, and only two, in the provisions of the scheme as approved on the 'second reading'. The first modification consists in giving the Conference the power, if it thinks fit, to submit a recommendation to the States which are parties to the Labour Organization, for submission to and consideration by the competent authorities but without any further obligation being placed on the Governments of the States. On this point the Sub-Committee have adopted the first of the United States proposals.

The second modification provides that in the case of a Federal State whose power to enter into Conventions on labour matters is subject to limitations, the Government of the State may elect to treat any draft Convention to which such limitations apply as a recommendation only - and thereupon the provisions of the new Article XIX as to recommendations shall apply.

To the first of these modifications we believe that no serious objection will be taken by the Commission. The submission of a recommendation instead of a draft Convention will be entirely in the discretion of the Conference, and for myself, I am disposed to think that the power to do so will be found to be advantageous and will promote the adoption of labour legislation. It may well be, in fact it is extremely likely, that subjects will come before the Conference on which owing to their complexity or the wide differences in the circumstances of the different States or other reasons, the Conference

> will find great difficulty in framing precise provisions for a Convention which shall be of universal application. Take, for instance, the question of unemployment. In regard to such a matter, it is easy to imagine that the framing of a Convention applicable to all countries, at any rate for a long time to come, will be an impossibility; but the Conference may well be able to lay down certain principles in more or less detail, and submit them in the shape of recommendations which the different States may give effect to, each in the way most suited to the local and national conditions.
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> The second modification is of much greater importance and is undoubtedly a serious change in the substance of the scheme. In effect it places the United States, and any other State which is in a similar position, on a different footing from and under a less degree of obligation than other States in regard to draft Conventions adopted by the Conference. The Commission, however, will observe two points in connection with the drafting of this exception from the general provisions of the scheme: first, that the exception extends only to the Federal States which are subject to limitations in respect of their treaty-making powers on labour matters; second, that the exception extends only in so far as these limitations apply, and no further.
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> A State will not be able to take advantage of the exception on any ground except that of actual existing limitations on its powers which prevent it entering into a labour Convention. And a State in which such limitations exist will only be able to claim the exception in regard to Conventions to which the limitations apply. If a Convention is proposed by the Conference to which the limitations do not apply and which is within the competence of the Federal Government, then the general provisions of the scheme in regard to Conventions will apply and the State will be under the same obligations as any other State. Also, if in the course of time the limitations are removed, those obligations will automatically apply..."

The Labor Commission adopted the report of the sub-committee. The Labor Commission reported to the Peace Conference: (168)

> "The Commission spent a considerable amount of time in attempting to devise a way out of this dilemma, and is glad to be able to record that it ultimately succeeded in doing so. Article 19 as now drafted represents a solution found by a Sub-Commission consisting of representatives of the American, British and Belgian Delegations specially appointed to consider the question. It provides that the decisions of the Labour Conference may take the form either of recommendations or of draft conventions. Either must be deposited with the Secretary-General of the League of Nations and each State undertakes to bring it within one year before

(168) Shotwell: Op.cit. Vol. II, p. 374

its competent authorities for the anactment of legislation or other action. If no legislation or other action to make a recommendation effective follows, or if a draft convention fails to obtain the consent of the competent authorities concerned, no further obligation will rest on the State in question. In the case of a Federal State, however, whose power to enter into conventions on labour matters is subject to limitations its Government may treat a draft convention to which such limitations apply as a recommendation only.

The Commission felt that there might in any event be instances in which the form of a recommendation affirming a principle would be more suitable than that of a draft convention, which must necessarily provide for the detailed application of principles in a form which would be generally applicable by every State concerned. Subjects will probably come before the Conference which owing to their complexity and the wide differences in the circumstances of different countries, will be incapable of being reduced to any universal and uniform mode of application. In such cases a convention might prove impossible, but a recommendation of principles in more or less detail which left the individual States freedom to apply them in the manner best suited to their conditions would undoubtedly have considerable value.

The exception in the case of Federal States is of greater importance. It places the United States and States which are in a similar position under a less degress of obligation than other States in regard to draft conventions. But will be observed that the exception extends only to those Federal States which are subject to limitations in respect of their treaty-making powers on labour matters, and further that it only extends in so far as those limitations apply in any particular case. It will not apply in the case of a convention to which the limitations do not apply, or after any such limitations as may at present exist have been removed. Though reluctant to contemplate an arrangement under which all States would not be under idential obligations, the Commission felt that it was impossible not to recognize the constitutional difficulties which undoubtedly existed in the case of certain Federal States, and therefore proposed the above solution as the best possible in the circumstances."

The report of the Commission on the International Labor Organization was approved at the plenary session of the Peace Conference on April 11, 1919. (169) In the course of the discussion preceding the approval, Mr. Barnes, a British delegate, speaking for the Commission said: (170)

(169) Shotwell: Op. cit. Vol. II, p. 368.
(170) Shotwell: Op. cit. Vol. II, pp. 393-4.

> "There are some states which have no authority to make labor agreements in the form of treaties. There are some States, such as the United States of America, that embrace many competent authorities in the sense in which the words are used in our document; and each of these competent authorities has a right, and must be left free to decide for itself. It was because of this that we had to give the right to the Conference - to impose an obligation upon the Conference rather - to cast their finding in certain cases in the form of a Recommendation instead of a Convention, and we also had to provide even if it were cast in the form of a Convention, that it would still be open for a Federal State to adopt it as a Recommendation to put before its own competent authorities and give effect to it, if at all, in its own time and in its own way. The net result of this - I want to be perfectly candid with the Conference - the net result of all this is, that a less degress of obligation falls upon a Federal State than upon other States signatory to our document. That is bad; it is regrettable, but, as we found, unavoidable."

With this history as a background let us consider the meaning of Article 405 of the Constitution of the International Labor Convention as finally adopted. (See p. 55, supra.). What is the difference between the procedure of a member state in the case of a recommendation as distinguished from a case of a draft convention adopted by the International Labor Conference?

A recommendation is "submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise". Article 405 (1). Accordingly each members is bound to "bring the recommendation...before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action". Article 405 (5). "If on a recommendation no legislative or other action is taken to make a recommendation effective...no further obligation shall rest upon the Member". Article 405 (8). Each member is bound to "inform the Secretary-General of the action taken". Article 405 (6). Since the recommendations do not involve the treaty-making power of a state and involve only its legislative power, the "authorities within whose competence the matter lies" are clearly the legislative bodies. There is no difference in dealing with a recommendation by a unitary state, a federal state whose power to enter into conventions on labor matters is subject to limitations, or a federal state whose power is not so limited. In the United States a recommendation dealing with working conditions in a field assigned to Congress, for instance, working conditions of seamen, will have to be submitted to Congress; recommendations dealing with working conditions in a field reserved to the States will have to be submitted to the legislatures of the States. Congress as well as the legislatures are free to pass or not to pass legislation in accordance with the recommendation.

A draft convention is to be treated in one way by a unitary state or a federal state the power of which to enter into conventions on labor matters is not subject to limitations and in a different way by a federal state whose power to enter into labor conventions is limited.

(a) In the case of a unitary state or a federal state whose power is not limited, the state is bound to "bring the...draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action". Article 405 (5).

Superficial consideration of this sentence might lead to the belief that it contemplates the enactment of legislation as the step to follow the submission of a draft convention to the competent authorities. This is not so.

Though legislation was contemplated to follow the ratification of a draft convention, such legislation has been provided for in the language of Article 405 (7) which binds a member, after the ratification of the convention, to "take such action as may be necessary to make effective the provisions of such convention". In general, the successive steps contemplated in connection with a draft convention are these: A draft convention is brought before the competent authorities. It may or may not obtain their consent. If it does it is ratified. Formal ratification is communicated to the Secretary-General and finally such action is taken as may be necessary to make effective the provisions of the convention.

What then is the meaning of the provision in Article 405 (5) that a draft convention is to be brought before the competent authorities "for the enactment of legislation or other action"? The phrase "for the enactment of legislation" does not at all refer to draft conventions. It refers only to recommendations were contemplated to call for legislation as the next step following their submission to competent authorities. The phrase is taken from Article 19 of the American proposal (p. 60, supra) which dealt with recommendations only and provided that recommendations be communicated to the member states "for appropriate legislation or other action necessary to make effective the provisions of such recommendation". No mention was made of "enactment of legislation" following the submission of a draft convention, either in Article 20 of the American proposal or in Article 18 of the British draft of February 2, 1919 or in Article 19 as amended February 28, 1919. (pp. 95-96, 87, 93, supra).

Furthermore according to Article 405 (1) a recommendation is "to be submitted to the members for consideration with a view to effect being given to it by national legislation or otherwise", while a convention is to be submitted "for ratification by the Members". Finally, in the French translation of Article 405 (5) the words "for the enactment of legislation" are translated "en vue de la transformer en loi", "la" referring to "la recommendation" and not to "le projet de convention". If "enactment of legislation" referred to both, recommendations and draft conventions, the translation would have been "les". Pursuant to Article 440 of the Treaty of Versailles the French and the

English texts are equally authentic. (171)

All of the above shows that "for the enactment of legislation" does not refer to draft conventions. The obscurity was created by the circumstances under which the duty was imposed on the members to submit draft conventions to their competent authorities. It will be recalled that one criticism of the American proposals was that it did not impose a duty on a member state to present draft conventions to its competent authorities. This was stated by Delevigne in his report on behalf of the subcommittee, (172) and has been expressed by Barnes on March 17, 1919. (173) To meet that criticism the American delegation apparently agreed, probably in the subcommittee, that a duty be imposed to present not only recommendations but also draft conventions to the competent authorities. That intention was expressed by inserting "draft convention" in the paragraph which imposed the duty with reference to recommendations. This does not mean however that the steps following submission are the same in both cases or that the authorities to whom submission is to be made are necessarily the same.

That brings us to the question as to who are the competent authorities before whom a draft convention is to be brought pursuant to Article 405 (5). Let us recall that according to the report of Delevigne (174) for the subcommittee which report was approved by Robinson (175)

> "The new articles (that is the language which is now Article 405) would make two modifications of importance, and only two, in the provisions of the scheme as approved on 'second reading'."

Those modifications were (a) the new concept of recommendations and (b) the privilege of a federal state to consider a convention as a recommendation. The scheme as approved on second reading was the British draft adopted on March 10, 1919. That draft and the preceding British drafts showed an intention to have the legislatures of the member states committed to a convention prior to the time that its ratification is communicated to the Secretary-General so that there might be no difficulties about legislation to make the convention effective. It was clearly the intention of the Commission to have conventions not only entered into but enforced. Hence the competent authorities the Commission had in mind seem clearly to have been those authorities within whose power it was to enact legislation to give effect to conventions.

In the United States the authorities competent to enact legislation to give effect to a treaty are either Congress alone, as discussed in Chapter III of this paper, or the legislatures of the 48 states in conjunction with Congress, all acting as usual within the spheres assigned to them by the Constitution. To try to obtain consent of those 49 bodies would mean to foreclose the possibility of any convention ever becoming effective in this country. Therefore, consent of Congress alone should be sought.

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(171) The pertinent part of Article 405 sub-div. 5 is translated as follows: "Chacun des Membres s'engage a soumettre...la recommendation ou le projet de convention a l'autorite ou aux autorites dans la competence desquelles rentre la matiere, en vue de la transformer en loi ou de prendre des mesures d'un autre ordre."

(172) Shotwell: Op. cit. Vol. II, p. 361.

(173) Shotwell: Op. cit. Vol. II, p. 269.

(174) Shotwell: Op. cit. Vol. II, p. 362.

(175) Shotwell: Op. cit. Vol. II, p. 285.

Apart from that, conventions should be submitted to the Senate in order to obtain a two-thirds majority required for a treaty, and if both Congress and the Senate approve of the convention it may be ratified by the President and ratification communicated to the Secretary-General of the League of Nations.

The next step would be, in accordance with Article 405 (7) to "take such action as may be necessary to make effective the provisions of such convention". Theoretically the United States government has a choice of alternatives in an attempt to live up to the international obligations as expressed in a ratified convention: The government may request Congress and the 48 legislatures to enact laws to give effect to the convention within their usual spheres, or it may ask Congress alone to pass the necessary legislation. Proceeding by way of the first alternative will hardly make effective the provisions of a convention. With a view to the realities of the situation and in order to comply with the requirement to do what may be "necessary to make effective the provisions of such convention", the government should choose the second alternative, to ask Congress alone to pass legislation in order to make the treaty effective.

(b) In the case of a federal state "the power of which to enter into conventions on labor matters is subject to limitations", according to Article 405 (9) the state may treat a draft convention as a recommendation only. It will be useful to consider what limitations are included in that language. The entire discussion preceding the adoption of Article 405 shows that the limitations in the mind of all participants were limitations on a federal government due to the fact that the constitution may assign the regulation of labor matters to other governmental units within the federal state, for instance, to States in the United States or to Provinces in Canada. No other limitations were mentioned in the course of the discussion. It is of interest, however, to note that on March 19, 1919, (176) Robinson while approving the report of Delevingne and thereby the present language of Article 405 said:

"As I listened to Sir Malcolm's statement I received the impression that he has told you that that word 'limitations' meant only constitutional limitations. I want to say that it includes other limitations such as judicial, and with that statement the American Delegation is prepared to accept this article!

There is no difference between a constitutional limitation and a judicial limitation. The Justices of the Supreme Court construe the powers of the federal government as they are laid down in the Constitution. That is the legal theory and one cannot depart from it in the course of a strictly legal argument. It may be that Robinson had in mind limitations of due process but they are just another kind of constitutional limitations.

When a federal state is limited as described in Article 405 (9) it may treat a draft convention as a recommendation only. If the view presented by the American delegation as to the extent of the treaty power were correct the procedure would be to send a draft convention to the 48 legislatures and to Congress for such action as they may choose to take thereon. There would be no need to present the draft convention to the Senate for ratification and there would be no need to try to obtain the consent of the competent authorities. This, however, is not the case. The power of the United States govern-

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(176) Shotwell: op.cit. Vol. II, p. 285.

ment to enter into conventions on labor matters is not subject to limitations due to its being a federal government and therefore, the United States cannot avail itself of the privilege expressed in Article 405 (9) to treat a draft convention as a recommendation only.

The limitations intended were probably only those due to the federal form of government of a member state. If it should be assumed that "limitations" includes all limitations, for instance, limitations because of the due process clause, then the United States government would be justified in treating at this time all child labor conventions as recommendations only, in view of the case of Adkins v. Children's Hospital. (177)

To summarize, it is suggested that labor conventions adopted by the International Labor Conferences should be handled as follows: If after an examination by experts familiar with the field they are found to be so phrased as to be applicable to conditions in this country they should be submitted to the Senate for its advice and consent, and also to the House of Representatives. If two-thirds of the Senators approve a convention and if the House does too, then the convention may be ratified by the President. The fact of ratification is communicated to the Secretary-General of the League of Nations and thereupon Congress passes laws to give effect to the convention.

This interpretation of the provisions of Article 405 of the Constitution of the International Labor Organization appears to be fully in accord with the views of Manley O. Hudson. (178)

B. CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOR ORGANIZATION PRIOR TO THE UNITED STATES BECOMING A MEMBER THEREOF AND THOSE ADOPTED LATER.

The United States officially participated in the proceedings of the Conference of the International Labor Organization in June, 1935. As to the conventions then adopted, the United States is under duty to submit them to the competent authorities for action. As to those previously adopted, the United States is under no duty whatever but it may adhere to them as a member of the International Labor Organization.

C. ADVISABILITY OF RATIFYING CONVENTIONS DRAFTED BY THE INTERNATIONAL LABOR ORGANIZATION.

As long as there is no constitutional amendment covering the matter, the treaty-making power of the federal government is the strongest weapon that can be used to regulate labor conditions uniformly throughout the entire country. The power is old but its exercise in the field of labor conditions would be new. In order to get the Congress and the people accustomed to the idea, it is advisable on principle, to ratify International Labor Organization Conventions even though they would merely act as stabilizers and would not improve labor conditions in this country at the present time. This would be the case, for instance, with convention No. 49 limiting the hours of labor in glass-bottle works to 42 a week. But before finally deciding on whether or not

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(177) Note 130, supra.

(178) Manley O. Hudson, Membership of the United States in the International Labor Organization, 28 American Journal of International Law 669 (1934).

ratification of conventions should be favored, each convention should be examined with a view to determining whether or not it is applicable to American conditions. It is said that convention No. 46, for example, adopted in June 1935 uses technical terms for describing varieties of coal which terms seem to differ from those used in this country. As the convention stands now it is possible that its application in this country would cause confusion and might discredit the idea of ratifying labor conventions. It is something that people with technical knowledge might well look into.

Now let us consider the conventions adopted in June, 1935, as well as those adopted previously, in their regular order. All remarks made here are subject to correction by persons who have expert knowledge of the subject matter of each particular convention.

1. Convention adopted in June, 1935:

Convention No. 45 "concerning the employment of women on underground work in mines of all kinds". The convention prohibits such employment but leaves power in national legislatures to make certain exceptions. It appears that there are very few women working in mines in this country so that the convention if ratified would not accomplish much of immediate value. However, it is thought that it should be ratified for the purpose of showing the solidarity of this country with all other members of the International Labor Organization and also because conditions may change and economic development may press women into work in mines.

Convention No. 46 "limiting hours of work in coal mines" has been referred to on the preceding page.

Convention No. 47 affirms the principle of a 40-hour week and leaves it to future conventions to apply the principle "to classes of employment in accordance with the detailed provisions to be prescribed by..... separate Conventions". This convention might well be ratified but it should not be followed by legislation. The convention is merely a declaration of a principle and though it uses the word "undertakes", all that each nation undertakes to do is "to apply this principle (of the 40-hour week) to classes of employment in accordance with detailed provisions to be prescribed by such separate Conventions as are ratified by that Member". This is an agreement to agree. Since the treaty power is called upon to perform a rather difficult task, that is, to override the reservation of powers to the States, the treaty should be a clearly binding document and if it is merely an agreement to agree it is submitted that the Supreme Court will not recognize it as a treaty which can support legislation overriding powers reserved to the States.

Convention No. 48 concerning the establishment of an international scheme for the maintenance of rights under invalidity, old age, and widows and orphans insurance. This convention does not seem to be applicable to American conditions because social insurance is in its early infancy in this country.

Convention No. 49 concerns the reduction of hours of work in glass-bottle works to 42 per week and 8 hours for each "spell of work". These

hours are, it is understood, actually in force in this country at the present time but this should not militate against the ratification of the convention. It should no doubt be ratified.

2. Conventions adopted prior to June, 1935:

(a) Hours of Work:

Convention No. 1 fixes the 8-hour day and the 48-hour week as the maximum in "industrial undertakings". The term "industrial undertakings" includes particularly:

"(a) Mines, quarries, and other works for the extraction of minerals from the earth.

(b) Industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale; broken up or demolished, or in which materials are transformed; including shipbuilding and the generation, transformation, and transmission of electricity or motive power of any kind.

(c) Construction, reconstruction, maintenance, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well telegraphic or telephone installation, electrical undertakings, gas work, waterwork or other work of construction, as well as the preparation for or laying the foundations of any such work or structure.

(d) Transport of passengers or goods by road, rail, sea or inland waterway, including the handling of goods at docks, quays, wharves or warehouses, but excluding waterways.

The competent authority in each country shall define the line of division which separates industry from commerce and agriculture."

Exceptions are made in numerous cases and apart from that exceptions are made for countries as a whole, for instance, for Japan and British India, China, Persia and Siam. Canada ratified that convention in 1935 and passed federal legislation to give effect to the convention. (179) It is submitted that it should be ratified by the United States.

Convention No. 14 which provides for a period of rest comprising at least 24 consecutive hours in every period of seven days in industrial undertakings should be ratified. It was ratified by Canada in 1935 and was made effective by a statute. (180) - (200)

Convention No. 20 prohibits the "making of bread, pastry or other flour confectionary during the night". It does not appear what the situation is with reference to the prohibition of night work in bakeries by state legislatures.

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(179) Statutes of Canada, 1935, ch.63.
(180)- (200) Statutes of Canada, 1935, ch.14.

Though there may be such statutes there are not many of them. It is suggested that the convention should be ratified.

Convention No. 30, which, with many exceptions, fixes a maximum 8-hour day and 48-hour week for work "in commerce and offices", should be ratified. Office workers are not organized and need legal protection.

Convention No. 41 forbids night work of women in industrial undertakings; it is submitted that it should be ratified.

Convention No. 43 fixes a maximum 42-hour week and 8-hour spell, with exceptions, in sheet glass works. The Flat Glass Manufacturing Code, approved December 22, 1934, under the N.R.A., fixed as the maximum 72 hours in 14 days, which corresponds to about 36 hours in a week. What the actual work hours are at the present time is not known. This Convention, no doubt, should be ratified.

(b) Child Labor:

Conventions Nos. 5 and 33 fix the minimum age for entry of children into employment in industrial undertakings and in non-industrial undertakings, respectively, at 14 years, with many exceptions. Exceptions are also made for whole countries like Japan and India. It is suggested that the conventions should be ratified. They do not refer to agriculture or to employment at sea.

(c) Labor conditions of seamen:

Several conventions regulate labor conditions of seamen. Convention No. 7 fixes the minimum age for admission of children for employment at sea as 14 years, with exceptions. Convention No. 8 provides for the payment of unemployment indemnity to a seaman in case of loss or foundering of the ship on which he was employed. Convention No. 9 provides for establishing facilities for finding employment for seamen. Convention No. 15 provides for fixing the minimum age for the admission of young persons for employment as trimmers or stokers as 18 years, with exceptions. Convention No. 16 concerns the compulsory medical examination of children and young persons employed at sea. Convention No. 22 concerns seamen's articles of agreement. Convention No. 23 concerns the repatriation of seamen. Convention No. 27 provides for marking of the weight on heavy packages transported by vessels. Convention No. 32 concerns the protection against accidents of workers employed in loading or unloading ships.

All those conventions appear to be a proper subject for ratification, provided they are approved by experts in the field.

(d) Protection of women:

Convention No. 3 concerns the employment of women in industrial undertakings before and after childbirth. Convention No. 41 prohibits the employment of women in industrial undertakings during the night, with exceptions.

They ought no doubt to be ratified.

(e) Agriculture:

Convention No.110 concerns the age for admission of children for employment in agriculture. Children under 14 years of age may be employed only outside of the hours fixed for school attendance.

Convention No. 11 undertakes to secure to agricultural workers the rights of association and combination.

The latter convention would be of help to the Southern Tenant Farmers' Union and to other agricultural workers' unions. Both conventions should, it is submitted be ratified.

(f) Social insurance:

Convention No. 24 concerns sickness insurance for workers in industry and commerce and domestic servants. Convention No. 25 concerns sickness insurance for agricultural workers. Convention No. 35 concerns compulsory old age insurance for persons employed in industrial or commercial undertakings, in the liberal professions, and for outworkers and domestic servants. Convention No. 36 concerns compulsory old age insurance for persons employed in agricultural undertakings. Convention No. 37 concerns compulsory invalidity insurance for persons employed in industrial or commercial undertakings, in the liberal professions, and for outworkers and domestic servants. Convention No. 38 concerns compulsory invalidity insurance for persons employed in agricultural undertakings. Convention No. 39 concerns compulsory widows' and orphans' insurance for persons employed in industrial or commercial undertakings, in the liberal professions, and for outworkers and domestic servants. Convention No. 40 concerns compulsory widows' and orphans' insurance for persons employed in agricultural undertakings.

It is understood that the various kinds of insurance which form the subject of those conventions are developed in this country to an insignificant extent. Consequently ratification of those conventions would sooner or later force the federal government to set up nation-wide systems for all those types of insurance. It is believed, however, that they should be ratified and that after ratification the States should first be given an opportunity to set up their own systems. The experience gained by those State systems will perhaps show the essential features of a system that is best adapted to the country as a whole.

(g) Unemployment:

Convention No. 2 provides for the establishment of a system of free public employment agencies under the control of a central authority. Convention No. 44 provides for insuring benefits or allowances to the involuntarily unemployed. It is believed they should be ratified.

(h) Forced labor:

Convention No. 29 concerns forced or compulsory labor. Enough is not known about this matter to say anything on the subject beyond general approval of the principle therein enunciated that forced labor shall not be imposed for the benefit of private individuals, companies or associations.

(i) Fee charging employment agencies:

Convention No. 34 abolishes such agencies, when conducted for profit, within three years after ratification of convention. Exceptions are provided for. It is believed it should be ratified

(j) Emigrants:

Convention No. 21 concerns the simplification of the inspection of emigrants on board ship. This appears to provide for a sound principle, to-wit: that the official inspection carried out on board an emigrant vessel for the protection of emigrants shall be undertaken by not more than one government. It should be ratified.

It is repeated that the final decision of whether or not a particular convention should be ratified depends on a thorough technical study of the subject-matter involved.

D. Summary of Arguments For and Against Ratification of Conventions of the International Labor Organization.

Arguments pro:

1. Uniformity of effect. Whatever can be validly regulated by a convention will be binding throughout the country as a whole.

2. Cooperation of entire legislative with executive departments of Government. As appears from Chapter VI of this report, labor conventions of the International Labor Organization are so drafted that they will require legislation before they can become effective. Apart from that, the Constitution of the International Labor Organization calls for consent of the competent legislative authorities before ratification of a convention may be communicated to the International Labor Organization. Therefore, it will not be sufficient for the Senate and the President to ratify a convention; a citizen of this country will not be affected until the competent legislative authorities give their consent to the ratification and, in addition, after ratification, pass laws to give effect to the convention. That will remove fears of some people that the Senate and the President might put something over on the country against the wishes of the people.

3. Duty to set up standards while delegating power will continue. If we look at the theory of separation of powers as protection to the citizen, when Congress leaves rule-making and administration to a subordinate body, Congress has to set up proper standards in connection with that delegation of power as in the case of any ordinary legislation.

4. International Labor Conventions, to which about 60 nations are potential signatories, tend to raise the standard of living of workers in all the 60 countries. Low standards of living of workers in other countries tend to lower the standards in this country because of international competition.

5. The International Labor Organization includes countries which are not members of the League of Nations; hence the fate of the League is not necessarily the fate of the International Labor Organization.

6. Many of the conventions will mean an actual improvement in the labor standards. Those that will immediately act as stabilizers will have the advantage of providing against attempts to lower labor standards.

Arguments contra:

1. Dislike of foreign entanglements. The answer to that argument is that this is an interdependent world and low standards of labor in one country tend to depress standards in every other country that competes in world markets.

2. There is a possibility of a complaint by another State against the United States coming ultimately before the Permanent Court of International Justice. If one member complains that another member fails to live up to its obligations, a Commission of Enquiry may be organized to investigate the matter and make recommendations. The dissatisfied member may refer the matter to the Permanent Court of International Justice. "The Permanent Court of International Justice may affirm, vary, or reverse any of the findings or recommendations of the Commission of Enquiry, if any, and shall in its decision indicate the measures, if any, of an economic character which it considers to be appropriate, and which other governments would be justified in adopting against a defaulting government (Article 418). In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Enquiry, or in the decision of the Permanent Court of International Justice, as the case may be, any other Member may take against that Member the measures of an economic character indicated in the report of the Commission or in the decision of the Court as appropriate to the case (Article 419)." The answer to that objection is that this country has already acquiesced in that possibility by becoming a member of the International Labor Organization. Obviously it did not become a member just to pay dues or to attend conferences. It became a member with the idea that some of the conventions might at some time be ratified by the United States and with that there necessarily goes the possibility of a dispute coming before that Court. I am informed by the International Labor office in Washington, D. C., that no complaint of that kind has ever been made by any member of the International Labor Organization against another member.

CHAPTER VIII.

CANADIAN CONSTITUTIONAL PROBLEMS IN CONNECTION WITH RATIFICATION OF CONVENTIONS OF THE INTERNATIONAL LABOR ORGANIZATION. COMPARISON WITH PROBLEMS IN THE UNITED STATES.

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The position of the Dominion of Canada has greatly changed since the World War. Its autonomy within the British Empire increased and so did the degree of its independence in international dealings. The new status of the Dominion of Canada found expression in the Statute of Westminster, 1931, (201) which provided that "The Crown is the symbol of the free association of the members of the British Commonwealth of Nations" and that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof."

The sole written constitutional provision bearing on Canadian treaties is Section 132 of the British North America Act, 1867, (202) which reads as follows:

> "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries."

In practice there have developed several forms of treaties binding on Canada internationally. A recent writer lists them as follows: (203)

> "1. International obligations may be imposed on Canada by treaties made in the name of the British Empire but to which other parts of the Empire are also signatories...
>
> 2. Obligations may now be imposed upon Canada by treaties negotiated by Canadian Plenipotentiaries under full powers issued by His Majesty, and made by His Majesty 'in respect of the Dominion of Canada' and ratified by His Majesty under the Great Seal of the Realm at the instance of the Canadian Government after the approval thereof by Parliament has been secured...
>
> 3. International obligations may be imposed on Canada by treaties made in the name of His Majesty but to which Canada is a signatory by a Plenipotentiary authorized to sign 'for' Canada...

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(201) Statutes of Canada, 1932, pp. V-VIII.
(202) Revised Statutes of Canada, 1927, vol. V. p. 4444.
(203) Vincent C. MacDonald: Canada's Power to Perform Treaty Obligations, The Canadian Bar Review, vol. 11, p. 581. at pp.590-592 (Nov. 1933)

4. International obligations may be imposed on Canada by a treaty made by His Majesty on the advise of his Imperial Ministers and to which Canada is not a formal or consenting party..."

The provision of the United States Constitution is that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The prerequisities of a treaty becoming binding on Canada and on the United States are so different that there is no basis for any attempt to draw lessons for the United States from Canadian procedure.

After a treaty is formally entered into there is still a question of due process in this country (see Chapter V of this paper) but there is no such question in Canada because there is no requirement of due process as a limitation on the treaty-making power in Canada.

There is a Canadian problem however that is similar to a problem in this country. The problem relates to the power of the Dominion Parliament to pass legislation by way of giving effect to a treaty where such legislation and treaty concern matters ordinarily within the jurisdiction of the Provinces.

The powers of the Dominion Parliament as against the power of Provincial Legislatures are outlined in sections 91 and 92 of the British North America Act, 1867, which read as follows: (204)

"VI. DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91 Legislative Authority of Parliament of Canada.

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defense.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

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(204) Revised Statutes of Canada 1927, vol. V, p. 4435-7.

12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interests.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. Subjects of Exclusive Provincial Legislation.

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes: -

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Province, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for Enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province."

It appears therefore that certain legislative powers have been exclusively assigned to the Provincial Legislatures while all other legislative powers have been granted to the Dominion Parliament by the comprehensive grant "to make laws for the Peace, Order and good Governmentof Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." But within that framework, regulation of labor conditions is generally a matter within the exclusive jurisdiction of the Provinces just as it is generally within the exclusive jurisdiction of the States in this Country.

In 1925 the Governor-General in Council referred certain questions to the Supreme Court of Canada in connection with the convention of the International Labor Organization which limits hours of labor in industrial undertakings to 48 in the week and 8 in the day. (205) The Court held that the undertaking of Canada under Part XIII of the Treaty of Versailles (Constitution of the International Labor Organization) was to bring the labor convention before the competent authorities and proceeded to define the competent authorities as follows:

"Under the scheme of distribution of legislative authority in the B.N.A. Act 1867, legislative jurisdiction touching the subject-matter of this convention is subject to a qualification to be mentioned, primarily vested in the Provinces. Under the head of jurisdiction in s. 92 (13) Property and Civil Rights, or under s-s.16. Local and Private Matters Within the Province, or under both heads, each of the Provinces possesses authority to give the force of law in the Province to provisions such as those contained in the draft convention. This general proposition is subject to this qualification, namely, that as a rule a Province has

(205) Re Treaty of Versailles, Re Hours of Labor (1925) 3 D.L.R. 1114

no authority to regulate the hours of employment of the servants of the Dominion Government.

It is necessary to observe, also, that as regards those parts of Canada which are not included within the limits of any Province, the legislative authority in relation to civil rights generally and to the subject matter of the convention in particular, is the Dominion Parliament . . .

It follows from what has been said that the draft convention ought to be brought before the Parliament of Canada as being the competent legislative authority for those parts of Canada not within the boundaries of any Province; and if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provision, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The convention should also be brought begore the Lieutenant-Governor of each of the Provinces for the purposes of enabling him to bring it to the attention of the Provincial Legislature as possessing, subject to the qualification mentioned, legislative jurisdiction within the Province in relation to the subject-matter of the convention."

The decision confirmed the practice of the government in "referring the conventions and recommendations to the Dominion or the province, according to the opinion of the Minister of Justice, as to which was the competent authority in each case." (206) Since the Parliament of Canada has exclusive jurisdiction over "Navigation and Shipping" (207) conventions dealing with seamen have, as a rule, been ratified and followed by federal legislation. (208)

In 1931 in the case of Re Aerial Navigation (209) the Judicial Committee of the Privy Council at London, England, considered the powers of the Dominion Parliament to legislate in execution of the convention to regulate aerial navigation. Canada signed the convention in 1919. The legislation in question was the Aeronautics Act 1927 and connected therewith were Air Regulations governing procedure in licensing pilots, aircraft and aerodromes. Though the Judicial Committee stated that they were in position to uphold exclusive regulation of aeronautics by the Dominion on the basis of certain powers expressly granted to the Dominion by the British North America Act and on basis of the power granted to the Dominion "to make Laws for the Peace, Order, and good Government of Canada," as construed by the courts, they preferred to put their decision on the broad basis of sec. 132 of the B.N.A.A. which gave the Dominion power to legislate in execution of treaties. They said:

"It will be observed...from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation on order that it may be carried out..."

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(206) Bryce M. Stewart: Canadian Labor Laws and the Treaty (1926) p. 57
(207) British North America Act, 1867, sec. 91 (10) page 134 supra.
(208) League of Nations, International Labour Conference, Nineteenth Session Geneva, 1935, Report of the Director, Appendix, International Labour office, Geneva, 1935. See also International Labour Office, The Progress of Ratification, July, 1935.
(209) (1932) 1. D.L.R. 58

The fact that the Judicial Committee went out of its way for the first time to enunciate the power of the Dominion Parliament under Sec. 132 to pass legislation in execution of treaties and relegated to an inferior position as "forced analogies or piecemeal analysis" the possibility of supporting this legislation as being within the jurisdiction of the Dominion apart from treaty makes one feel that when a case is presented to the Judicial Committee wherein the sole support for Dominion legislation will be s. 132, the Committee will uphold such legislation even though it might involve matters exclusively within the jurisdiction of the Provinces.

Prior to the decision of that appeal a prominent writer (210) while commenting on the decision of the Supreme Court of Canada from which the appeal had been taken to the Judicial Committee of the Privy Council, reached the conclusion that: "The Dominion Parliament has the power and is the proper body to pass legislation implementing 'Empire treaties' even where these treaties deal with matters that ordinarily are within the legislative jurisdiction of the provinces."

Soon after the Aerial Navigation Case the Judicial Committee of the Privy Council passed on the effect of the international radio convention signed in Washington, D. C. in 1927, Canada being one of the signatory parties. (211) The question involved was whether the Parliament of Canada had jurisdiction to regulate and control radio communication. It was held that the Parliament had such power 1) by virtue of the convention, and 2) because power over broadcasting was included in the power over "telegraphs" which, being expressly excepted from the jurisdiction of the Provinces, sec.92 (10a) of the B.N.A. Act, was thereby exclusively granted to the Dominion government in accordance with Sec. 91 (29) of the B.N.A. Act. The Province attempted to establish its jurisdiction by going over sections 91 and 92, paragraph by paragraph, and conceding certain fields to the Dominion while claiming others for itself. With reference to this method the Court commented as follows:

> "It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. . . Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the Convention. In a question with foreign powers the persons who might infringe some of the stipulations in the Convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation, and the only legislation that can deal with them all at once is Dominion legislation. . .
>
> "It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention: and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada. . .
>
> ". . . once you come to the conclusion that the Convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the Aviation case which might be literally transcribed to this. The idea pervading that judgment is that the whole subject of

(210) F.A.M. MacKenzie, Case and Comment, Canadian Bar Review, vol. 9.p.506, at p. 512 (September 1931)

(211) Re Regulation and Control of Radio Communications (1932) 2.D.L.R. 81

aeronautics is . so completely covered by the treaty ratifying the Convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject. The same might at least very easily be said on this subject. . ."

Since the radio convention was not in form an "Empire treaty" sec. 132 was not held applicable, technically, but the power of Canada to legislate in execution of the treaty was upheld under the clause giving the Dominion government power "to make Laws for the Peace, Order, and good Government of Canada." Again the Judicial Committee stressed the power of the Dominion to legislate in execution of treaties though it could have rested on the power of the Dominion to regulate radio as included in "telegraphs" secs. 92 (10)a and 91 (29).

Those decisions foreshadow a holding by the Judicial Committee that Dominion legislation in execution of a labor convention is valid even though but for the convention the particular labor conditions would be a subject of exclusive Provincial regulation.

Those decisions had an effect on the procedure of the government in dealing with labor conventions. The position was taken that the government might pursue the old method of submitting conventions to the Provincial legislatures or to the Dominion parliament depending on whether the subject matter is within the jurisdiction of the former or the latter, but that the government might also pursue an alternative method of advising ratification of the conventions on behalf of Canada and following up a ratified convention by federal legislation. This alternative method was actually followed. In June and July 1935 the Parliament of Canada passed legislation to give effect to the following three International Labour Organization conventions after they had been ratified by Canada: To provide for a weekly day of rest, to provide minimum wage fixing machinery and for the 8 hour day and 48 hour week. (212) In introducing the legislation in the House of Commons the Prime Minister stated the views of the government as follows: (213)

"In introducing this legislation, it was pointed out by the Prime Minister in the House of Commons on February 8, 1935, that in the opinion of the Government the Parliament of Canada was the competent authority to give legislative effect to these draft conventions. Reference was made to the opinions expressed by the Department of Justice as to the legislative jurisdiction concerning the subject matter of the draft conventions which had been submitted to it at various times and to the judgment of the Supreme Court of Canada in 1925 that the legislative power in regard to hours of labour was vested in the provincial legislatures under section 92 of the British North America Act, except in so far as works and undertakings which fall within the Dominion jurisdiction are concerned. (Labour Gazette, July 1925, p. 671). Two cases involving the power of the Dominion Parliament to implement an international treaty, by enacting legislation in regard to aviation and radio communication, were decided in favour of the Dominion by the Judicial Committee of the Privy Council in 1931 and 1932 respectively. These decisions were based largely on section 132 of the British North American act which provides as follows:

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(212) Statutes of Canada, 1935, chs. 14, 44 and 63.
(213) The Labour Gazette, vol. XXXV, No. 8, published by the Department of Labour, Canada, at Ottawa, August 1935.

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countrie arising under Treaties between the Empire and such Foreign Countries..

The Prime Minister expressed the opinion that in view of these judgments, the Parliament of Canada is competent to implement draft conventions of the International Labour Conference of which Canada is a member and which was established under the Treaty of Versailles to which Canada is a party. The Prime Minister observed, however, that the Treaty of Versailles provides for a federal government exercising its discretion in regard to draft conventions of the International Labour Conference and referring them merely as recommendations of the Conference to the Provincial authorities.

> The discretion might be exercised by sending the recommendation down to a province and it might be exercised as we now propose to exercise it, by legislation in the House. That discretion which is vested in the Government of Canada was exercised, it is true, in one way at one time. We now propose to exercise it as indicated in the judgments in the radio and aeronautics cases."

One alternative appears to exclude the other. It will be recalled (214) that a federal state may treat a convention as a recommendation only if the power of the state to enter into the particular convention is subject to limitations. When Canada asserts her power to enter into a particular labor convention and to follow it up by federal legislation, she thereby takes the position that her power to enter into the particular convention is not limited Thereby she puts herself outside of the group of federal states which may treat a convention as a recommendation only. The alternatives which Canada has, appear to be these: While treating a draft convention as a draft convention, Canada may obtain the consent to ratification of the convention either from the Dominion Parliament alone, with a view to sec. 132 of the British North America Act, or from the Dominion Parliament and the Provincial Legislatures and thus fail to utilize the powers granted by sec. 132. After ratification Canada again has two alternatives: She may make the convention effective by laws passed by the Dominion Parliament alone, or by laws passed by the Dominion Parliament and the Provincial Legislatures, all acting within their usual spheres. In either situation the second alternative is theoretically possible but is in actuality clumsy and impractical, while the first alternative appears to be legally sound and practical in either situation.

Irrespective of theoretical assertions, in 1935 Canada has treated draft conventions dealing with matters ordinarily within Provincial jurisdiction, as draft conventions and dealt with them in an expeditious and practical way. The House of Commons and the Senate of the Parliament of Canada passed resolutions to approve the conventions; by orders in council the government of Canada approved the ratification of the conventions; the ratifications were communicated by the Prime Minister in his capacity as Secretary of State for External Affairs of Canada to the Secretary-General of the League of Nations though the Dominion of Canada Advisory Officer accredited to the League of Nations at Geneva, then legislation was enacted to give effect to the conventions. (215)

(214) Art. 405 (9), page 85 supra.

(215) The various steps are described in The Labour Gazette, Dept. of Labor, Ottawa, Canada, August 1935.

By way of summary, the following may be stated:

1. There is no similarity between the procedure by which a treaty is made on behalf of Canada and on behalf of the United States.

2. There is no question of a limitation by a due process clause in Canada while such a limitation seems to exist in the United States.

3. Labor conditions are within the jurisdiction of the Provinces in Canada and of the States in the United States; in this respect there is great similarity.

4. Labor conditions among seamen are within the exclusive jurisdiction of the Parliament of Canada. Consequently that body passed legislation to give effect to several conventions regulating labor conditions among seamen ratified on behalf of Canada.

5. The Parliament of Canada seems to have power, by legislation passed in execution of a treaty, to regulate matters normally within the jurisdiction of the Provinces; the situation is similar in the United States where Congress has power to regulate matters reserved to the States if such regulation takes place in order to give effect to a treaty.

6. As soon as it became apparent that the Parliament of Canada has the power described in the preceding paragraph, the Canadian federal government adopted the procedure of ratifying conventions of the International Labour Organization, and the Parliament of Canada followed them up by statutes in execution of the conventions, binding all over Canada whether or not they regulated matters ordinarily within the jurisdiction of the Provinces.

The procedure in this country, it is submitted, should be similar.

Because of lack of time no study has been made of the constitutional problems of foreign federal states other than Canada, in connection with their ratification of conventions drafted by International Labour Conferences.

CHAPTER IX

SUGGESTIONS AS TO TREATIES WITH CANADA ABOLISHING CHILD LABOR AND LIMITING HOURS OF LABOR

The labor standards established in the conventions of the International Labor Organization are not the standards of the most advanced countries. Advanced countries can afford to give their working people better conditions than can backward countries because of higher technological development, better plants and better industrial management. The United States being industrially among the most advanced or perhaps the most advanced nation ought naturally to be able to maintain its working population in much better working conditions than is the case in other countries. Actually the organized workers of this country have achieved standards higher than those fixed in the International Labor Organization conventions. For instance, an 8 hour day or 48 hour week (216) is certainly too long for this country. Similarly a 14 year limit on the age at which children are admitted to employment (217) is too low. Though this country may be able to afford a 16 year minimum wage provision and a general 35 to 30 hour week, many other countries can hardly do so. In this connection it may be important to bear in mind that the agenda of the 1936 Conference of the International Labor Organization will include a proposed draft convention to establish a 40 hour week in the textile industry.

A treaty with one power regulating child labor and hours of labor would be legally just as valid and binding as a convention drafted by the International Labor Organization and ratified by many countries.

For reasons stated in Chapter V of this study, the fixing minimum wages is disregarded. As to hours of labor and minimum age of admission to employment the United States might, if it desired to do so, enter into a treaty with another nation, for instance Canada, fixing standards as to those two subject matters.

Hours of Labor: A superficial glance at the Report of the Canadian Department of Labor (218) shows that in the year ending March 31, 1934, the average hours of labor seem to have been far above 40 per week. They were probably 45 to 48 per week, though in some industries they were 40 and in some still lower. According to trade union reports unemployment among trade unionists in Canada in 1934 (membership of trade unions was 155,694) was 19.2% (219) In 1935 unemployment decreased, but in July 1935 it was still 15.1%. (220)

In the United States average hours in all industries declined from 43.3 per week in June 1933 to 37 per week in June 1934. (221) Hours are probably

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(216) Convention No. 1 - p. 115 supra.
(217) Conventions No. 5, 33 - p. 117 supra.
(218) Dominion of Canada, Report of the Department of Labour for the fiscal year ending March 31, 1934, Ottawa, 1934.
(219) The Labour Gazette, February 1935 at p. 170.
(220) The Labour Gazette, September 1935, p. 846.
(221) Tables on Operation of the National Industrial Recovery Act as prepared by Research & Planning Division of the National Recovery Administration, Washington, D.C., February 1935, Table 6.

longer now while unemployment is generally admitted to be around 10 million. From the standpoint of this country a 40 hour treaty would be a step forward because by cutting down the hours where they are above 40, the general average would be brought down below 40. It is not known whether Canada would be willing to agree to a 40 hour treaty, An inquiry would easily reveal the state of mind of the Canadian Government.

Child Labor: There is a greater probability of Canada's agreeing to a treaty limiting the minimum age of employment of children to 15 or perhaps 16 years. Let us compare the situation in the United States and in Canada as regards child labor.

The N.R.A. codes had practically abolished child labor in the United States. (222) The general limitation was 16 years with some exceptions which made the minimum either higher or lower than 16. Apart from that there was, in general, an 18 year limitation in hazardous occupations. In some trades where work is hard and hazardous, the limitation was 21 years. After the N.R.A. had been declared invalid child labor began to come back. To what extent nobody knows, but it seems certain that in the absence of a legal check employment of children will increase and will throw out of employment adult workmen, heads of families.

A study published by the International Labor Office (223) which contains a review of the legislation of all countries as of January 1, 1935 shows that at that time the great majority of the States of the United States had laws limiting the age of admission of children to industrial employment, or employment in general at 14 years. Some states had a higher limit; 15 years was the limit in California, Michigan and Texas; 16 years in Montana, Ohio, Utah and Wisconsin. According to a summary published by the Children's Bureau of the U. S. Department of Labor, (224) in the year 1935,

> "Stimulated undoubtedly by the effect of the NRA code provisions which fixed in most industries a 16 year minimum age for employment of minors, 2 States, Connecticut and New York, have enacted legislation establishing a minimum age of 16. Even with this addition only 5 States have laws fixing a minimum age of 16 for employment during school hours."

In Canada the standards are slightly lower. According to the International Labor Office study (225) the minimum age of admission of children to employment in factories was 15 years in Alberta and British Columbia; 14 years in Nova Scotia, Ontario, Quebec and Saskatchewan, in the latter province the age for girls was 15 years. Apart from that there are higher limits in hazardous occupations.

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(222) U.S. Department of Labor, Children's Bureau, Washington, "Effect of N.R.A. Codes on Child Labor, June 5, 1935.
(223) International Labor Office; Children and Young Persons Under Labour Law, Geneva, 1935.
(224) Child-Welfare News Summary, Children's Bureau, U.S. Department of Labor, Washington, D. C. June 14, 1935.
(225) Note 223 supra.

The Liberal government which came into power on October 14, 1935 is undoubtedly in favor of progressive labor legislation. The Prime Minister, Mackenzie King, was connected with the Department of Labor at Ottawa for many years. However, the constitutional power of the Dominion Government to enact legislation by way of giving effect to treaties and thereby to regulate labor conditions in the provinces is not yet established by the courts. It has been stated in Chapter VIII of this paper that the Dominion Parliament passed legislation in the Summer of 1935 to give effect to several labor conventions of the International Labor Organization, that is, those providing for a 48 hour week and 8-hour day, for a 24-hour rest in a week and for the establishment of minimum wage fixing machinery. The attitude of the Liberal Government towards this legislation has been described by the Ottawa correspondent of the New York Times, (226) as follows:

> "He (Prime Minister Mackenzie King) has announced that at an early date the Supreme Court of Canada will be asked to pass upon the validity of the eight-hour day, the minimum wage, unemployment insurance and other social measures enacted by the Bennett government.
>
> Mr. King has let it be known that he sympathizes with the aims of this legislation but is not sure of its validity in view of the fact that the British North America Act allotted control of property and civil rights to the Provinces.
>
> "Unlike the United States, Canada possesses machinery for testing the constitutionality of legislation before it is put into effect. The eight-hour day law was actually supposed to take effect before the elections, but the Department of Labor, uncertain of its authority, delayed the framing of regulations."

On the basis of the decisions of the Judicial Committee of the Privy Council in the Aviation and Radio cases (227) one may be confident that the statutes in question will be sustained. If the Supreme Court of Canada should sustain them the decision would be handed down in a few months. An appeal to the Privy Council at London would take longer. It is not believed that the Canadian Government will negotiate an hours treaty or minimum age treaty with the United States without a judicial decision upholding the validity of the statutes enacted in 1935 by way of giving effect to conventions of the International Labor Organization.

For the purpose of drafting a treaty or treaties with Canada limiting the hours of labor or the age of admission of children to employment, it is believed that the Labor Studies Section should be called upon to supply substantive provisions which are considered desirable and capable of being introduced in this country, and at the same time offer a probability of being accepted by Canada, all on the basis of studies made or to be made. Such data can then be embodied in a treaty or treaties and in legislation which will give effect to the treaties.

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(226) The N. Y. Times of Nov. 3, 1935 "King to Rush Test on New Job Laws".
(227) Notes 209 and 211, supra.

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